92-1398

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN RE: GREENE, RICHARD D. & DONNA J.
husband and wife – Debtors

ROSS RICHARDSON, Chapter 7 Panel Trustee,

Petitioner,

vs.

MT. ADAMS FURNITURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

Does Indian tribal immunity preclude a valid claim by a Chapter 7 Bankruptcy Trustee against a tribal business entity, when the basis for the claim arose out of commercial activity which occurred off of the Indian reservation, and involved non-Indians?

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vs.

MT. ADAMS FURNITURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ross Richardson, Chapter 7 Trustee, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 25, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is in Appendix A hereto, infra, page 1. The judgment of the United States District Court for the District of Montana is printed in Appendix B hereto, infra, page 26. The judgment of the United States Bankruptcy Court for the District of Montana is printed in Appendix C hereto, infra, page 28.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page 1) was entered on November 25, 1992. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does Indian tribal immunity preclude a valid claim by a Chapter 7 Bankruptcy Trustee against a tribal business entity, when the basis for the claim arose out of commercial activity which occurred off of the Indian reservation, and involved non-Indians?

STATUTES INVOLVED

28 U.S.C. Section 157, 28 U.S.C. Section 1334, and 11 U.S.C. Section 106 are set forth in pertinent part in Appendix D, page 32, attached hereto.

STATEMENT OF CASE

A. *Proceedings below:*

This was a case originally brought as an adversary proceeding by Ross Richardson, a Chapter 7 Panel Trustee for the District of Montana. Richard D. and Donna J. Greene filed a petition for relief under Chapter 7 of the Bankruptcy Code on April 26, 1989, in the United States Bankruptcy Court for the District of Montana under Cause No. 89-20544. In administering the Chapter 7 estate, the Trustee believed that a preferential transfer (11 U.S.C. Section 547) had occurred prior to the filing of the bankruptcy petition and commenced an Adversary Proceeding against Mt. Adams Furniture in the United States Bankruptcy Court for the District of Montana under Adversarial Cause No. 90/0023. It is undisputed that the preferential transfer occurred. The sole issue is whether Mt. Adams Furniture, a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Nation, enjoys sovereign immunity, rendering the Bankruptcy Court without jurisdiction to impose judgment against it in the amount of $8,779.00.

The United States Bankruptcy Court found that Mt. Adams was not entitled to sovereign immunity. The United States District Court affirmed the decision. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, finding that 11 U.S.C. Section 106(c) did not operate as a waiver of sovereign immunity.

The underlying claim of the trustee has been brought against a wholly-owned enterprise of the Yakima Nation which builds furniture and sells it from its plant in Wapato, Washington, located within the exterior boundaries of the Yakima Indian Reservation. The debtors operated their business, Custom Carpets, in Townsend, Montana, where the repossession took place. Townsend, Montana, is not located within the boundaries of the Yakima Indian Reservation, nor are the debtors members of the Yakima Tribe. There has been no contested issue of fact throughout these proceedings.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG FEDERAL COURTS

A. *The Parties.*

This case concerns the authority of a Chapter 7 Bankruptcy Trustee to recover goods repossessed by Mt. Adams Furniture from a Chapter 7 debtor. That a "preferential transfer" under 11 U.S.C. Section 547 occurred, is undisputed. Under the aforementioned section of the Bankruptcy Code, the Trustee is the only entity that can bring a "preferential transfer" action.

The Chapter 7 Trustee represents the bankruptcy estate and is empowered to sue on the estate's behalf. See 11 U.S.C. Section 323. His mandate is to collect and reduce to money the property of the estate, and thereafter distribute the money to creditors who file valid proofs of claim in accord with the Bankruptcy code. See 11 U.S.C. Sections 704 and 726.

This case is not one involving parties that are members of the Yakima Indian Nation. It does not deal with a contract between the Indian Nation and the Trustee. The transaction in question did not occur on the Indian Reservation. Simply stated, this is an action between a Chapter 7 Trustee for recovery of goods (or their value) removed by a business entity owned by the Yakima Indian Nation. The repossession took place in Townsend, Montana, on property not owned by the Indian Nation. Accordingly, important questions of federal law are presented which have not been, but should be, resolved by this Court.

B. *The United States Supreme Court Decisions.*

The Ninth Circuit Court reviewed decisions of the United States Supreme Court and found no case directly on point. Instead, it interpreted various decisions of the Supreme Court

to imply a basis for its decision. The following statements, which appear in the opinion delivered in this case in the Ninth Circuit Court of Appeals, indicate that this lack of direction caused problems for the Circuit Court:

> "As we analyze this *somewhat confusing area of Indian Tribal Jurisprudence*, . . ." (emphasis supplied)
>
> * * *
>
> There is language in Supreme Court cases, such as *Wheeler* and *Mescalero Apache Tribe v. Jones*, which raises some question about tribal authority, and perhaps immunity, *off the reservation*." (emphasis supplied)

Thereafter, it is submitted that the Court interpreted and distinguished these decisions in an erroneous manner, contrary to the implied rule already created by this Court. A review of the Ninth Circuit Court of Appeals' opinion reveals a thinly veiled request for this Court's review.

The Circuit Court indicated that it had no United States Supreme Court case on point with which to reach its conclusion in this case. Further, the Court felt that there was no Circuit Court decision to rely on in reaching its conclusion. As stated by Judge Rymer in the concurring opinion to the decision in question, which is attached hereto:

> I agree with my colleagues that the tribe's sovereign immunity bars this action under either theory argued by the parties—that the Bankruptcy Court's exclusive jurisdiction abrogates tribal sovereign immunity and that 11 U.S.C. Section 106(c) effects a waiver of that immunity. In framing the issues this way, however, both parties assume that the scope of tribal immunity was locked in at the time the treaty with the Yakima Nation was ratified and can only be changed by Congressional action; the immunity enjoyed by other sovereigns, however, is subject to evolution through the common law. As it has evolved, the immunity of a foreign state is limited to its

> public acts and does not extend to suits based on its commercial or private acts. *I write separately to note that we have never squarely addressed the question whether the law on sovereign immunity of an Indian nation is similarly developed. It is not an easy question to resolve, and I am not so persuaded as the majority appears to be that "the scope of tribal immunity has to be measured at the common law as it existed at some earlier time. . . ."* (emphasis supplied).

Thereafter, the concurring opinion expressed further reservations by reviewing federal common law changes in the doctrine of immunity. The concurring opinion noted that by enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. 94-582, 90 Stat. 2891 (1976), Congress adopted the "restrictive view" of sovereign immunity. The House of Representatives report on the FSIA stated that:

> the bill would codify the so-called "restrictive" principal of sovereign immunity *as presently recognized in international law*. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

House Report (Judiciary Committee) No. 94-1487 (Sept. 9, 1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 (emphasis in the original).

Judge Rymer's opinion also notes that common law sovereign immunity among the states has also evolved. Although tribal sovereign immunity is not precisely the same as international sovereign immunity, or sovereign immunity among the states, the common law sovereignty of Indian Nation tribes is not absolute. Further, she noted:

> Because that common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial

> actor to escape the legal consequences of its actions, *whether tribal immunity now extends to commercial activities is an important, complex, and unresolved question.* (emphasis supplied).

In a footnote, Judge Rymer also noted that:

> No other court has directly confronted this question, either. . . .

The footnote then went on to cite two federal court cases which touched on the commercial exception recognized in the FSIA and commercial transactions of an Indian tribe. In addition, the concurring opinion provided a list of state supreme court decisions which have addressed the commercial exception, but with ambiguous results. The opinion clearly reflects the thought of the Ninth Circuit Court of Appeals that there is a need for this Court to decide the matter.

In fact, when reviewed in their context, there appears to be more dicta in United States Supreme Court decisions supporting a denial of tribal immunity than affirming it. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 36 S.Ct. 2d 114, 93 L.Ed. 1267 (1973), this court stated:

> . . . but tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities . . . not on any reservation. Absent expressed federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. (citations omitted).

In *U.S. v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303, (1978), we see this language:

> The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign

> powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication *as a necessary result of their dependent status*. (*Supra*), 435 U.S. at 323 (emphasis supplied).
>
> * * *
>
> . . . moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost *by virtue of their dependent status*. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . . . (*Supra*), 435 U.S. at 326 (emphasis supplied).

In Montana vs. United States, 450 U.S. 544, 546, 101 S.Ct. 1245, 67 L.Ed. 2d 493, (1981) this Court again observed:

> This court most recently reviewed the principals of inherent sovereignty in *United States v. Wheeler* (citations omitted). In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territories," (citations omitted), the Court upheld the power of the tribe to punish tribal members who violate tribal criminal laws. But the court was careful to note, that through their *original incorporation into the United States* as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. (citations omitted). The Court distinguished between those inherent powers retained by the tribes and those divested:
>
> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . ."
>
> * * *

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction *is necessarily* inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis in the original).

Interestingly, in *Mescalero Apache Tribe v. Jones* (*Supra*), the Court appeared to reach a decision that would be contrary to that reached by the Ninth Circuit in this case. In interpreting the Indian Reorganization Act of 1934 (48 Stat. 984), the Court stated that it would be unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of government". *Mescalero*, 411 U.S., at 153, 93 S.Ct. at 1273. The equitable basis for the doctrine of *Mescalero* exists here. The Supreme Court's recognition of the obligation of an enterprise to pay taxes upon its operations should also extend to its legal responsibilities under the Bankruptcy Code.

Almost as an exclamation point, the final paragraph in the footnote to Judge Rymer's concurring opinion points out the critical need for the United States Supreme Court to review this issue. It states:

> Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," (citations omitted), it has never directly considered the reach of tribal immunity in business ventures. Indeed, Justice White dissented from the denial from certiorari in *Padilla*, 490 U.S. at 1030, urging that the Court should have heard the case "to resolve the conflict among the state courts"; and Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity

extends to cases arising from a tribe's conduct of commercial activities off the reservation." (citations omitted).

C. *United States Circuit Court Decisions*

Although the Ninth Circuit Court could find no parallels to this issue, it appears that the Court of Appeals for the Eighth Circuit may have. It recognized that Courts have drawn distinctions between the actions of a government in its sovereign capacity and its operations in commercial transactions generally carried on by corporations organized by the government and invested in one of the sovereign's functions. In *North Dakota-Montana Wheat Growers Assoc. v. United States*, 66 F.2d 573 (8th Cir. 1933), the Court impliedly conceded that a government is not immune from suit where it organizes and operates such a business corporation.

In *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), it also appears that this important question has been resolved with an opposite result. The tribe asserted that the Federal Court had no jurisdiction to hear the matter because of a case then recently decided by the United States Supreme Court, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Although *Dry Creek* dealt in part with the issue of tribal court jurisdiction, (and the Ninth Circuit holds that the jurisdictional issue is not a deciding factor in this case), the opinion itself dealt with tribal immunity. In *Dry Creek*, the appellate Court held:

> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal affairs and when it concerns an issue of a non-Indian. *Id*, at 685.

The Court went on to note in reviewing the *Santa Clara* decision:

> . . . the limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled. *Id*, at 685.

The *Dry Creek* Court also looked at one aspect of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, (1978):

> This relates to the sovereignty holding by the Ninth Circuit. The Circuit had in substance held that the authority there in issue was presumed to be in the tribe unless Congress had acted. The majority in the Circuit opinion focused on whether Congress had taken away the sovereignty of the tribe as to the matter in issue. The Supreme Court reversed and turned the matter around. The Court said:
>
> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or Congressional enactment. As the Court of Appeals recognized, Indian Tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers *inconsistent with their status*." (emphasis in the original. *Dry Creek, (Supra)*, at 684."

Admittedly, the *Dry Creek* decision was based on an analysis that required protection of the rights of U.S. citizens from "unwarranted intrusions on their liberty". But the rationale in *Dry Creek* is the same as in this case.

All of the above-referenced Circuit Court decisions recognize in principle that tribal sovereign immunity is limited and not applicable to activities conducted off of Indian country.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG STATE COURTS

As indicated in the footnotes to the concurring opinion in the Ninth Circuit decision, various state courts have reached different resolutions of this issue. In fact, depending on the state, the same issue could be decided a number of different ways.

In *Atkinson v. Haldinen*, 569 P.2d 151, (Alaska 1977), a case stemming from an automobile accident on the Indian reservation, the Court held that the tribal immunity of the Indian nation was not waived since the acts alleged in the complaint related to a tribe's governmental function rather than it's corporate functions. However, the Court did note in a lengthy opinion that a number of other states have waived tribal immunity in certain instances.

An opposite result was reached in *Padella v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), where the Court reviewed the question as to whether state courts have jurisdiction over Indian tribes that have not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct. In reaching its decision, the Court noted that the "supreme law of the land" had not divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that had asserted sovereign immunity for its off-reservation conduct. It held that the business conducted by the tribe off of its reservation was not clothed with immunity.

Similarly, in *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989), where a business corporation owned by the tribe was sued for personal injuries, the Court held that the corporation was not entitled to assert the tribal immunity for its off-reservation commercial activities.

Finally, in *North Sea Products Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, (Wash. 1979), the court held that tribal immunity includes immunity from garnishment actions and immunity is not waived by the tribe's commercial activity. However, in a concurring opinion, one of the justice's noted that the present law is "unjust, unwise and unreasonable".

It is undisputed by the parties hereto that Indian tribes possess a degree of immunity from suit. It is further clear upon a review of the federal and state case law that the degree of immunity depends upon the locale. The tangled inequalities that exist throughout the country must be resolved by this Court. The simultaneous application of contradictory results in the courts below lead to anomalous results. This

Court should resolve the issue to establish a uniform approach to activities engaged in by an Indian nation off of Indian country. The Ninth Circuit opinion drains the concept enunciated in *Mescalero*, *Wheeler*, and *Montana*, of its meaning, and declares a blanket immunity to all Indian action, both on and off the reservation.

III. THE BANKRUPTCY CODE LIMITS THE SOVEREIGN IMMUNITY OF INDIAN NATIONS

In its discussion the Ninth Circuit Court has determined that the Bankruptcy Code does not waive tribal sovereign immunity. The applicable section of the Code, 11 U.S.C. Section 106, is printed in Appendix D hereto, infra, page 32. It is the trustee's position that the Code does apply because of the "dependent status" of the Indian nation. This Court has already made clear that a general statute which by its terms applies to all persons includes Indians and their property interests. *F.P.C. v. Tuscarora*, 362 U.S. 99, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985). The Bankruptcy Code is a general statute, which does apply to Indians.[1]

---

[1] There are, however, three exceptions to this general principle as outlined by the case of *U.S. Department of Labor v. OSHRC*, 935 F. 2d 182, 184 (9th Cir. 1991):

> A federal statute of general applicability that is silent on the issue of applicability of Indian tribes will not apply to them if:
>
> (1) The law touches "exclusive rights of self governance in purely intramural matters";
>
> (2) The application of the law to the tribe would "abrogate rights guaranteed by Indian treaties";
>
> (3) There is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on the reservations . . .

(continued on next page)

Federal Courts have applied the Bankruptcy Code to tribes and their corporations. See *Lower Brule Construction Co. v. Sheesley Plumbing & Heating Co. et al.*, 84 B.R. 638 (D.S.D. 1988); *In Re Adams*, 133 B.R. 191 (Bktcy. W.D. Mich. 1991); *In Re Shape*, 25 B.R. 356 (Bktcy. D. Mont. 1982); and *In Re Sandmar Corp.*, 12 B.R. 910 (Bktcy. D.N.M. 1981).

The Trustee believes that bankruptcy issues are issues of overriding national interest of the federal government and that the Federal Courts have sole and exclusive jurisdiction over the issue of turnover of the property of the estate. Because of the dependent status of the tribe, the immunity of the Indian tribe does not apply here. See, for example, *In Re Sandmar*, 12 B.R. 910, 914 (Bktcy D.N.M. 1981) and *In Re Shape*, 25 B.R. 356, 358 (Bktcy D. Mont. 1982).

At the present time, Indians can file for Bankruptcy and enjoy the benefits and protections of that legislation. They should also be required to bear the burdens.

(continued from previous page)

The first exception does not apply in this case. The turnover of the property of the bankruptcy estate does not touch "exclusive rights of self-governance in purely intramural matters". A bankruptcy trustee is seeking funds to pay creditors. Tribal self-government is not impacted. See *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F. 2d 683, 685 (9th Cir. 1991) where the Court decided that ERISA applied to the tribal mill. ERISA obviously could have significant impact upon how a tribe treats its employees. A trustee seeking funds from a tribal enterprise holding funds belonging to the estate is certainly far removed from such a scenario.

The second exception does not apply in this case since it involves no "rights guaranteed by Indian Treaties".

Finally, the Trustee is not aware of, nor is the tribal business asserting, any legislative history that would exclude Indian tribes from the application of the Bankruptcy Code. A plain reading of the Code indicates that no theory exempts Mt. Adams Furniture from the applicability of the Bankruptcy Code.

IV. THE INEQUITIES NOW FOUND IN THE LAW PROVIDE FURTHER *REASON FOR REQUIRING* A LIMITING OF INDIAN SOVEREIGN IMMUNITY

The foundation of the Ninth Circuit's opinion is contained in the following citation:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . These Acts reflect Congress' desire to promote the "*goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development . . . .*" Under these circumstances, we are not disposed to modify the long-established principal of sovereign immunity. (emphasis supplied).

If the decision at issue here were upheld, and became the law of the land, it would place any entity dealing with a business owned or operated by an Indian nation at an unequal bargaining position. The Indian business entity would receive only the benefits of the bargain, with none of the risks. Business entities who deal with tribes and tribal nations may know about Indian sovereign immunity, and may require a waiver of it prior to proceeding with any business dealings. However, it is submitted that in many instances, individuals may not even know that they deal with a business that is owned or operated by an Indian Nation. The name "Mt. Adams Furniture" in no way connotes ownership by an Indian Nation. Individuals who unwittingly deal with such entities are the persons who will ultimately be forced to suffer from this decision.

This was also the opinion of the Arizona Supreme Court in *Dixon v. Picopa Const. Co.*, (*Supra*):

> Neither is the Community's self-determination imperiled by our assertion of jurisdiction (denying tribal immunity). This private action based on an off-reservation tort does not in any fashion limit the community's powers nor the power in which it exercises those powers. (citations omitted).
>
> In contrast, *the federal government's policy promoting commercial dealings between Indian tribes and non-Indians is furthered by withholding immunity in this case.* We realize that, here, Dixon did not voluntarily become involved with Picopa, but we believe that an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into a contractual relationship with that Indian corporation or any other Indian corporation. *Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune to suit.* (citations omitted). *This may well retard a tribe's economic growth.* (citations omitted). Further, Congress' provision for allowing Indian tribes to segregate themselves into governmental and commercial corporate units, (citations omitted) arguably implies that "Congress did not intend all commercial activity" undertaken by Indian entities to be immune from suit. (citations omitted). *Thus, Congress itself recognized that immunity may have deleterious effects on a tribe's economic development. Dixon,* (*Supra*), at 1112. (emphasis supplied).

The *Dixon* court emphatically disagrees with the basis for the Ninth Circuit holding in this case, and argues pursuasively that a decision such as this will, in the long run, harm the Indian nations.

CONCLUSION

Based on facts similar to those of the instant case, courts below have arrived at conflicting rulings, based upon different foundations. These matters must be resolved by this Court in order to establish a uniform rule for commercial dealings between Indian tribes and non-Indians.

Wherefore, the Petitioner respectfully prays that a Writ of Certiorari be granted.

DONE AND DATED this 17th day of February, 1993.

U.S. BANKRUPTCY TRUSTEE

By: _____

Ross Richardson
P.O. Box 399
Butte, MT 59703

APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICHARD D. GREENE and DONNA J. GREENE, husband and wife, *Debtors,* ROSS RICHARDSON, Chapter 7, *Trustee-Appellee,* v. MT. ADAMS FURNITURE, *Defendant-Appellant.*	No. 91-35491 D.C. No. CV-90-62-PGH OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
July 8, 1992—Seattle, Washington

Filed November 25, 1992

Before: Arthur L. Alarcon, Pamela Ann Rymer, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson; Concurrence by Judge Rymer

SUMMARY

Civil Litigation and Procedure/Immunity/Jurisdiction/Bankruptcy/Litigation and Procedure (Civil)/Preferential Transfers/Government Law/Native Americans

Reversing and remanding a district court judgment upholding a decision of the bankruptcy court, the court of appeals held that a wholly-owned and operated business of the Yakima Indian Nation located on the Yakima Indian Reservation was immune from suit by a trustee in bankruptcy seeking to set aside as a preferential transfer a commercial transaction between the Indian business and an off-reservation bankruptcy debtor.

Appellant Mt. Adams Furniture, a wholly-owned and operated business of the Yakima Indian Nation with its place of business on the Yakima Indian Reservation in Washington, sold furniture to Richard and Donna Greene in Montana. Mt. Adams subsequently repossessed the furniture for nonpayment. When the Greenes filed for relief under Chapter 7 of the Bankruptcy Code within 90 days, the repossession became a preferential transfer. The trustee in bankruptcy filed an adversarial proceeding against Mt. Adams to set aside the transfer. Mt. Adams objected on the basis of sovereign immunity. The trustee argued that tribal sovereign immunity had been waived under provisions of the Bankruptcy Code. The bankruptcy court rejected Mt. Adams' claim of immunity and entered judgment for the trustee. The district court affirmed.

[1] While the court agreed that the Yakima Nation enjoyed sovereign immunity by reason of its original status as a sovereign, and that a waiver of sovereign immunity could not be implied but had to be unequivocally expressed, that did not decide the issue before the court. **[2]** The court recognized that while the Supreme Court has stated that the doctrine of tribal immunity does not immunize individual members of the

tribe, the Court has not distinguished between tribal immunity off and on the reservation, nor has it had occasion to discuss the immunity of businesses owned and managed directly by the tribe. The court stated that the Supreme Court's failure to distinguish between the tribe's on and off reservation immunity could be argued as at least an implicit recognition that tribal immunity does not disappear at the boundaries of the reservation. **[3]** Thus, in determining whether tribal immunity attached to Mt. Adams in this case, and against the background of nearly two hundred years of recognizing sovereign immunity's extraterritorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity was a compelling, if not controlling, factor. Therefore, the court concluded that since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extraterritorial component. **[4]** Recognizing that the Supreme Court has analyzed tribal sovereignty issues under either a preemption analysis or a dependent status analysis, the court concluded that while the preemption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation, the dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. However, neither was involved when a wholly-owned tribal enterprise doing business on the reservation claimed tribal immunity from a suit that is the result of a private commercial transaction, and the Supreme Court has never stated that either analysis has affected the government's recognition of an Indian tribe possessing the attributes of a common law sovereign. Thus, there was no general impediment to the existence of the immunity claim by the Yakima Nation.

[5] The court next had to determine whether anything in the Bankruptcy Code evidenced an intention to subject the Indian Tribes to bankruptcy court jurisdiction. **[6]** The court rejected

the trustee's assertion that 11 U.S.C. § 106(c) operates as a waiver of the tribe's sovereign immunity. [7] Similarly, the bankruptcy court's jurisdiction over the property of an estate, and its jurisdiction to hear adversary proceedings, did not operate to pierce the Yakima Nation's immunity from suit. Accordingly, the court remanded the matter with instructions to dismiss the adversary proceeding.

Concurring, Judge Rymer agreed that the tribe's sovereign immunity barred this action under either waiver theory argued by the trustee. Judge Rymer stated, however, that because the common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions, whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question.

COUNSEL

R. Wayne Bjur and Tim Weaver, Cockrill, Weaver & Bjur, Yakima, Washington, for the defendant-appellant.

Ross P. Richardson, Henningsen, Vucurovich & Richardson, Butte, Montana, for the trustee-appellee.

OPINION

T.G. NELSON, Circuit Judge:

Mt. Adams Furniture, a wholly-owned and operated business of the Yakima Indian Nation, appeals the district court's rejection of its claim of sovereign immunity in a bankruptcy proceeding imposing a judgment for preferential transfer by

the debtor to Mt. Adams Furniture. We hold that the Yakima Indian Nation is immune from the suit by the trustee and reverse the district court.

FACTS AND PROCEDURAL HISTORY

Mt. Adams Furniture ("Mt. Adams") is a wholly-owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation" or "Yakimas") with its place of business on the Yakima Indian Reservation at Wapato in the State of Washington. Mt. Adams sold furniture to Richard D. and Donna J. Greene (dba Custom Carpets) in Townsend, Montana. The stipulated facts indicate that title to the goods passed to the Greenes, and Mt. Adams had no security interest in the furniture.

Mt. Adams peaceably repossessed the furniture when the Greenes did not pay for it and took it back to Wapato. When the Greenes filed for relief under Chapter 7 of the Bankruptcy Code within ninety days, the repossession became a preferential transfer. Richardson, the trustee, filed an adversary proceeding to set aside the preferential transfer. Mt.Adams appeared, and claimed to be immune from suit. Based on the stipulated facts, the bankruptcy court rejected Mt. Adams' claim of immunity, and directed entry of judgment against Mt. Adams in the amount of $8,779. The bankruptcy court order was affirmed by the district court and this appeal followed.

DISCUSSION

I

[1] The Yakima Nation argues here, as it did in the courts below, that it is a sovereign by reason of its original status as a sovereign (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). It is possessed of "the common-law immunity from suit traditionally enjoyed by sovereign powers, . . . subject to

the superior and plenary control of Congress . . . . [A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes and citations omitted). With these propositions we can, and indeed must, agree. However, they will not readily decide the question before us.

We turn first to the decision of the bankruptcy court affirmed by the district court. The bankruptcy court dealt initially with the question of whether it had to defer to tribal court for determination of the claims involving the Yakima Nation, under *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Since the Yakima Nation did not contend there, or here, that this is a case requiring deference to tribal court but rather argues only that it is entitled to immunity from the suit, we need not discuss the issue of tribal court jurisdiction.

The bankruptcy court also held that Mt. Adams did not enjoy tribal immunity: "Furthermore, the Supreme Court has consistently held that the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses" (citing *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 165, 171-73 (1977) (*Puyallup III*)).

If only it were that easy. *Puyallup III* was a review of a judgment entered by the courts of the State of Washington. The state court judgment being reviewed recited that the court had jurisdiction to "regulate the fishing activities of the Tribe both on and off its reservation . . . ." *Id.* at 167. The Supreme Court summarized its holding on the Tribe's claim of sovereign immunity as follows: "We hold that insofar as the claim of sovereign immunity is advanced on behalf of the Tribe, rather than the individual defendants, it is well founded . . . ." *Id.* at 167-68.

[2] Although the Court went on to point out that the doctrine of tribal immunity did not immunize individual members

of the tribe (*id.* at 171-72), it did not distinguish between tribal immunity off and on the reservation. Nor did it have any occasion to discuss immunity of businesses owned and managed directly by the Tribe itself. Therefore, *Puyallup III* not only does not support the bankruptcy court's analysis, the failure of the Supreme Court to distinguish between the Tribe's on and off reservation immunity can be argued as at least an implicit recognition that tribal immunity does not disappear at the boundaries of the reservation.

II

The Mt. Adams business venture involved a commercial business operated directly by the Yakimas for profit purposes, selling furniture to people located off the reservation. The first question then becomes whether tribal immunity attaches to such an enterprise.

Arizona courts have considered the immunity of a "subordinate economic enterprise," which is a tribally-owned and operated business such as Mt. Adams here. The courts of Arizona hold such enterprises to be immune from suit for torts, even when the enterprise operates outside tribal boundaries. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968). This rule was extended to suits based on breach of contract in *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971).[1]

The courts of New Mexico have considered and rejected the Arizona approach. In *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), the Pueblo was doing business as a roofing contractor on off-reservation projects. The New Mexico Supreme Court rejected the Pueblo's claim of immunity, saying:

[1] *See also, North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (en banc) (a tribe does not waive its immunity from garnishment by engaging in commercial activities off the reservation).

> Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity. It is the policy of New Mexico to allow breach of written contract actions against the state. Therefore, we hold that, regardless of where the contract was executed, the district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe.

754 P.2d at 850-51 (internal citation omitted).

The *Padilla* case starts by recognizing the general rule that tribal immunity is immunized from diminution by the states. 745 P.2d at 847 (citing *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877 (1986)). It ends by stating, as quoted above, that since no provision has been found which *prohibits* state jurisdiction over tribes for off reservation activities, New Mexico could exercise such jurisdiction as a matter of comity. *Id.* at 850.

At first reading, the New Mexico court seems to have changed hands with the sword. Yet, it started its discussion of tribal immunity with the phrase: "Where a tribe's sovereign immunity obtains . . ." (*id.* at 847), implying that the first inquiry is to determine whether tribal immunity exists in general, although it undertook no analysis of that question.

Tribal immunity has been described as "the common-law immunity from suit traditionally enjoyed by sovereign

powers." *Santa Clara*, 436 U.S. at 58. A necessary first step in the analysis is determining the scope of sovereign immunity at the common law.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the case relied on by *Padilla*, the Supreme Court reviewed sovereign immunity at the common law. It noted there were two concepts involved, "one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* at 414.

As far as the second concept is concerned, the Court determined that immunity of one sovereign in the courts of another was a question answered under the law of the sovereign providing the forum. The Court acknowledged that the extent to which comity would be extended between sovereigns had changed over the years.

> It is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when The Schooner Exchange [11 U.S. 116, 7 Cranch 116, 3 L. Ed. 287] was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts.

Id. at 417.

The question in *Hall* was whether there was a constitutional impediment to California's application of its own law as it existed in 1968, when the accident occurred, or whether it had to apply "the sovereign immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. The Court's discussion of the doctrine as it evolved from the early days of the Republic makes it clear that the states, and the United States, have greatly changed their views of sovereign immunity over the years. In holding there was no Constitutional hindrance to the states' doing so, the Court left the extent of immunity between states to be resolved by the law of those

states. But that discussion also recognized that immunity between sovereigns at the common law was much broader than it is now, particularly as it relates to commercial enterprises.[2]

The Court said in a footnote:

> Such a defense was sustained in 1929 by the Supreme Court of North Dakota in Paulus v. South Dakota, 58 ND 643, 647-649, 227 NW 52, 54-55. The States' practice of waiving sovereign immunity in their own courts is a relatively recent development; it was only last year, for example, that Pennsylvania concluded that the defense would no longer be recognized, at least in certain circumstances, in that State. [citations omitted] But as States have begun to waive their rights to immunity in their own courts, it was only to be expected that the privilege of immunity afforded to other States as a matter of comity would be subject to question.
>
> Similarly, as concern for redress of individual injuries has enhanced, so too have moves toward the reappraisal of the practices of sovereign nations according absolute immunity to foreign sovereigns. The governing rule today, in many nations, is one of restrictive rather than absolute immunity.

Id. at 418, n.13.

Congress reflected the restrictive view of sovereign immunity when it adopted the Foreign Immunities Act of 1976 (28

[2]*See* Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 COLUM. L. REV. 1086 (1965), for a discussion of the development of the restrictive doctrine of sovereign immunity. That doctrine does not recognize sovereign immunity for commercial activities carried on by a foreign state.

U.S.C. § 1602, *et seq.*) The Act specifically eliminated the sovereign immunity of foreign states involved in commercial activity within the United States. [28 U.S.C. § 1605(a)(2)][3]

[3] The actions of the states and the United States in limiting their own immunity, and the action of Congress in limiting the immunity of foreign states underscore the original scope of sovereign immunity. Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

If there were error in the *Padilla* court's analysis, it was in failing to recognize that the scope of tribal immunity in the courts of New Mexico was not wholly a question of New Mexico law. As the *Padilla* court itself noted, "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states." 754 P.2d at 847. Thus, the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.

The issues involved in the *Padilla* case are not before us, and we discuss it here only for the purpose of making the point that the scope of tribal immunity has to be measured at

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[3]From Congress' adoption of the Foreign Immunities Act, we can imply at least two things:

a. It takes an act of Congress to effectively limit the sovereign immunity of a foreign sovereign; and

b. Congress knows how to limit the sovereign immunity of others when it wants to.

the common law as it existed at some earlier time,[4] rather than adopting present limits on sovereign immunity accepted by the states for their own purposes.

Before we leave the question of Yakima Nation's sovereign immunity, we need to look at two lines of Supreme Court cases for possible impact on our analysis. The Court has analyzed tribal sovereignty issues under either a pre-emption analysis or a dependent status analysis. We will examine each of these in turn.

Federal pre-emption was first stated as the basis for resolving issues of state authority over activities on reservations in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973) ("the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"). This approach has been used by the Court in cases involving state efforts to tax activities on the reservation, as in *McClanahan* itself,[5] as well as cases where the state is attempting to regulate activities on the reservation, such as by licensing the sale of liquor,[6] or by applying state statutes regulating bingo.[7]

Almost by definition, application of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation. If there is no attempted state action, there is nothing to be pre-empted. Here, there is no state action proposed, so the pre-emption cases do not affect our analysis.

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[4]Contemporaneously with Senate ratification of the Treaty with the Yakimas in 1859 (12 Stat. 951), the Supreme Court said, "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. . . ." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

[5]*See, e.g., Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[6]*Rice v. Rehner*, 463 U.S. 713 (1983).

[7]*California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).

The other approach the Court has used is to look at the tribe's dependent status and determine how that might affect the tribe's ability to do what it proposes to do. The Court noted in *Washington v. Confederated Tribes*, 447 U.S. 134, 153-54 (1976):

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

The Court said in *United States v. Wheeler*, 435 U.S. at 326:

> Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy . . . . They cannot enter into direct commercial or governmental relations with foreign nations . . . . [T]hey cannot try nonmembers in tribal courts.

(Citations omitted.)

In a general sense, a claim of tribal sovereign immunity involves external relations of the tribe. However, the dependent status of the tribes has been a factor in the analysis of

tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts. An assertion of sovereign immunity is not an affirmative act of the tribe, in the sense involved in the dependent status cases. It is, instead, a claim of status arising from sovereignty itself. Whether for this reason or others, the dependent status analysis has not been used by the Supreme Court in cases involving claims of tribal immunity.

[4] As we analyze this somewhat confusing area of Indian tribal jurisprudence, we conclude that pre-emption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation. The dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. Neither is involved when a wholly-owned tribal enterprise doing business on the reservation claims tribal immunity from a suit which is the result of a private commercial transaction. Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status.

The distinction between tribal sovereignty in general and tribal immunity from suit is reflected in the result in *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. ____, 111 S. Ct. 905, 112 L. Ed. 2d 1112, 1120 (1991). Oklahoma sought to impose its cigarette tax on cigarettes sold by the Tribe in its convenience store located on trust lands. The Court held that Oklahoma could impose its tax on cigarettes sold to non-tribal members, and that the Tribe could be required to collect the tax. *Id.* at 1122. The Court further held that tribal immunity prevented the state from collecting the tax on sales to tribal members and from suing the Tribe to collect amounts due. *Id.* Even though tribal sovereignty did not prevent the state from imposing a duty to collect the tax on

the Tribe, tribal immunity prevented the state from suing to collect the amounts due.

In *Potawatomi*, Oklahoma contended that tribal sovereignty should be limited to tribal courts and the internal affairs of tribal government because "tribal business activities . . . are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context," and because "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws." *Id.* at 1120. In rejecting Oklahoma's argument, the Court said:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine . . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development . . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at 1120-21 (citations omitted).

[5] We conclude from the above analysis that sovereign immunity, as it existed at common law, had an extra-territorial component. "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Wold*, 476 U.S. at 891. Congress has not acted to limit the reach of this element of tribal sovereignty, so there is no general impediment to the existence of the immunity claim by the Yakima Nation.

III

We turn now to this specific case. The trustee filed an adversary proceeding against a wholly-owned business of the Yakima Indian Nation. Is there anything in the Bankruptcy Code which evidences an intention to subject Indian tribes to bankruptcy court jurisdiction?

"The trustee is a representative of the estate, not an officer, agent or instrumentality of the United States." *In re Hughes Drilling Co.*, 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987). Thus, the Yakimas' lack of immunity to suit by the United States itself (*United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986); *cert. denied*, 481 U.S. 1069 (1987)) does not render it amenable to suit by the trustee.

The trustee argues that two separate sections of the Bankruptcy Code operate as a waiver of sovereign immunity. The first is 11 U.S.C. § 106:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections(a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> > (1) a provision of this title [11 USCS §§ 101 et seq.] that contains "creditor",

> "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

"Governmental Unit" is defined in section 101(24) as follows:

> "[G]overnmental unit" means United States, State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

[6] Since subsections (a) and (b) relate to situations in which a sovereign has filed a claim in the bankruptcy proceedings, which the Yakima Nation did not, we are left with § 106(c). The Supreme Court has interpreted the effect of § 106(c) in two cases, which compel rejection of the trustee's arguments here.

In *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), the trustee sought a money judgment against a state. Four members of the Court interpreted § 106(c) to authorize only injunctive or declaratory relief against a state because of the language that governmental units are bound by resolution of "issues" rather than "claims." *Id.* at 102. Justice Scalia believed the Congress lacked authority to abrogate the states' immunity to money judgment actions under the Eleventh Amendment, thus making up the majority for its holding that a money judgment could not be obtained against a state under § 106(c). *Id.* at 105.

In the recent case of *United States v. Nordic Village, Inc.*, 501 U.S. ____, 112 S. Ct. 1011, 60 U.S.L.W. 4159 (Feb. 25,

1992), the Court held that § 106(c) did not waive the immunity of the United States to suit for a money judgment. The Court construed § 106(c) as not being an unequivocal waiver of government immunity to suits for money judgments. *Id.* at 1017. For example, § 106(c) would permit the bankruptcy court to bind the government on the amount of the estate's liability for unpaid taxes. *Id.* If we assume, without deciding, that Indian tribes are "governmental units" for the purposes of § 106, then the waiver of sovereign immunity accomplished by § 106 does not extend to actions for money damages against Indian tribes.

Second, the trustee relies on the case of *In re Sandmar Corp.*, 12 B.R. 910, 915 (Bankr. D.N.M. 1981). That court found jurisdiction over the Navajo Nation based in part on the exclusive jurisdiction of the bankruptcy court over the property of the bankrupt estate in a Chapter 11 case, citing 28 U.S.C. § 1471(e). To the extent the trustee here makes a similar argument under 28 U.S.C. § 1334(d),[8] the argument has no merit. In *Nordic Village*, the Supreme Court specifically rejected this contention as it applied to the United States. The Court said:

> In *Blatchford v. Native Village of Noatak*, 501 U.S. ____, ____ (1991) (slip op., at 10), the argument was made that Alaska's Eleventh Amendment immunity to suit was abrogated by 28 U.S.C. § 1362, a jurisdictional grant, akin to § 1334(d), that gives district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . aris[ing] under the Constitution, laws, or treaties of the United States." Rejecting that contention, we observed: "The fact that Congress

[8] 28 U.S.C. § 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of the estate. (Internal citation omitted).

> grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.*, at ____, n.4 (slip op., at 10, n.4).

Nordic Village, 112 S. Ct. 1017 (emphasis in original).

[7] The bankruptcy court's jurisdiction over the property of the estate, and its jurisdiction to hear adversary proceedings, does not operate to pierce the Yakima Nation's immunity from suit.

CONCLUSION

Cases involving tribal sovereignty have usually come up in the context of a conflict between a state's authority and the sovereignty of a tribe. For that reason, we have discussed those cases, even though a claim of state authority is not involved here. Cases which do involve such a claim may well require a different analysis than we have employed, and we do not intend to foreclose any such approach.

There is language in Supreme Court cases, such as *Wheeler*,[9] and *Mescalero Apache Tribe v. Jones*,[10] which raises some question about tribal authority, and perhaps immunity, off the reservation. However, the Court has recently, and emphatically, reaffirmed the validity of the tribal immunity doctrine in *Potawatomi*. Given the Court's demonstrated concern for

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[9]*Wheeler*, 435 U.S. at 326. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

[10]411 U.S. 145, 149 (1973). "But tribal activities conducted outside the reservation present different considerations." *See also Montana v. United States*, 450 U.S. 544, 564 (1981). "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

protecting tribal opportunities for economic development,[11] we believe the Court would hold that tribal immunity does not stop at the reservation boundaries, at least in a case such as this.

REVERSED and REMANDED with instructions to dismiss the adversary proceeding.

RYMER, Circuit Judge, concurring:

I agree with my colleagues that the tribe's sovereign immunity bars this action under either theory argued by the parties — that the bankruptcy court's exclusive jurisdiction abrogates tribal sovereign immunity and that 11 U.S.C. § 106(c) effects a waiver of that immunity. In framing the issues this way, however, both parties assume that the scope of tribal immunity was locked in at the time the treaty with the Yakima Nation was ratified and can only be changed by Congressional action; the immunity enjoyed by other sovereigns, however, is subject to evolution through the common law. As it has evolved, the immunity of a foreign state is limited to its public acts and does not extend to suits based on its commercial or private acts. I write separately to note that we have never squarely addressed the question whether the law on sovereign immunity of an Indian nation is similarly developed. It is not an easy question to resolve, and I am not so persuaded as the majority appears to be that "the scope of tribal immunity has to be measured at the common law as it existed at some earlier time." Since this point was not directly briefed in this case, I do not believe we can answer it authoritatively. I therefore understand the majority's opinion to reach no further than the issues actually raised.

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[11] "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon Band*, 480 U.S. at 219.

As the Supreme Court pointed out in *Nevada v. Hall*, 440 U.S. 410 (1979), the immunity of a sovereign in the courts of another sovereign is controlled by the law of the forum state. *Id.* at 416-17. The old rule of sovereign immunity under United States law was one of absolute immunity. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall stated that the

> perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive a part of that complete territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137. This rule of absolute immunity was followed by the Supreme Court into the twentieth century. *See Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 568 (1926) ("A real sovereign, a state, a nation, is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective.").

Sovereign immunity, like other legal concepts, is capable of evolution. *See Nevada v. Hall*, 440 U.S. at 417-19. Even before the Supreme Court's decision in *Berizzi Brothers*, the State Department had favored the restrictive view, which limits immunity to the noncommercial activities of a foreign sovereign. *See* David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Colum. L. Rev. 1440, 1452 (1983). The Supreme Court implicitly adopted the restrictive view in the early 1940's by agreeing to adhere to the policy opinions of the State Department. In *Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court stated:

> It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

Id. at 35. *See also Ex parte Peru*, 318 U.S. 578, 586-87 (1943); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In 1952, the State Department officially announced in the Tate Letter (letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952)) that it would be "the Department's policy to follow the restrictive theory of sovereign immunity." *Id.*

By enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. 94-582, 90 Stat. 2891 (1976), Congress adopted the restrictive view of sovereign immunity. The House of Representatives report on the FSIA stated that

> the bill would codify the so-called "restrictive" principle of sovereign immunity, *as presently recognized in international law*. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

House Report (Judiciary Committee) No. 94-1487 (Sept. 9, 1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (emphasis added). Since the enactment of the FSIA, the scope of the commercial exception that it codifies has been extensively litigated in the federal courts. *See, e.g., Republic of Argentina v. Weltover, Inc.*, ___ U.S. ___, 112 S. Ct. 2160 (1992) (breach of contract action involving bonds issued by Argentine national bank); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (tort action against Mexican state airline).

The common law sovereign immunity among the states has also evolved. In *Nevada v. Hall*, a California resident had sued the State of Nevada in California court to recover dam-

ages arising from an automobile accident with an employee of the University of Nevada. 440 U.S. at 419. The Supreme Court upheld the California court's rejection of Nevada's sovereign immunity defense, even though it noted that "when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts." *Hall*, 440 U.S. at 417.

Tribal sovereign immunity, such as that asserted by the Yakimas in this case, is not precisely the same as either international law sovereign immunity or sovereign immunity among the states:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323 (1978). Indian sovereignty is further distinguished because of the importance, as the Supreme Court has emphasized, of "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.' " *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. ___, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112 (1991).

Yet the common law sovereignty of Indian tribes is not absolute. The *Wheeler* Court identified several areas in which tribal sovereignty has been circumscribed: Indians can no longer freely alienate the land they occupy to non-Indians, they cannot enter into direct relations with foreign nations, and they cannot try nonmembers in tribal courts. *See* 435 U.S. at 326. At the same time, "Indian tribes have long been recog-

nized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Because that common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions, whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question.[1]

---

[1]No other court has directly confronted this question, either. Two recent opinions in other circuits have touched on the commercial exception recognized in the FSIA and commercial transactions of an Indian tribe. Neither, however, explicitly considers whether tribal sovereign immunity extends to commercial activities or is restricted by virtue of a tribe's dependent status or by virtue of evolution of the common law. In *Bank of Oklahoma v. Muscogee (Creek) Nation*, 1992 U.S. App. LEXIS 18593 (10th Cir. 1992), the Tenth Circuit found unpersuasive an analogy to the commercial exception in the FSIA in deciding that an interpleader action filed against an Indian tribe in connection with a dispute over a tribal bingo hall was barred by sovereign immunity. The Eighth Circuit held in *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), that the commercial nature of a loan between a credit union and an Indian tribe did not effect an implied waiver of tribal sovereign immunity. *Id.* at 1378.

As Judge Nelson notes, state supreme courts have addressed the commercial exception, but with ambiguous results. *See, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), *cert. denied*, 490 U.S. 1029, 1030 (1989). *See also Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation."); *Atkinson v. Haldane*, 569 P.2d 151, 169-70 (Alaska 1977) (courts do not recognize "proprietary act/governmental function" test re tribal sovereign immunity); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 939, 942-43 (no commercial exception under existing law, but

concurring justice suggests this rule is "unjust, unwise and unreasonable") (Wash. 1979).

Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *see Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (quoting *United States Fidelity & Guaranty*, 309 U.S. at 512), it has never directly considered the reach of tribal immunity in business ventures. Indeed, Justice White dissented from the denial of certiorari in *Padilla*, 490 U.S. at 1030, urging that the Court should have heard the case "to resolve the conflict among the state courts"; and Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activities off the reservation." *Id.*, 111 S. Ct. at 912 (citing the Foreign Sovereign Immunities Act).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BUTTE DIVISION

IN RE:

RICHARD D. GREENE and DONNA J. GREENE, husband and wife,

Debtors.

ROSS RICHARDSON, Chapter 7 Trustee,

Plaintiff, No. CV-90-062-BU

vs.

MT. ADAMS FURNITURE, ORDER

Defendant.

Mt. Adams Furniture, hereinafter referred to as appellant, instituted the above-entitled action seeking judicial review of an August 10, 1990, decision by the United States Bankruptcy Court for the District of Montana. Jurisdiction vests with this court pursuant TO 28 U.S.C. Section 158. On appeal, appellant's sole argument is that the bankruptcy court lacked jurisdiction over appellant, given the fact that

entity is a wholly owned and managed enterprise of the Confederated Tribes and Bands of Yakima Indian Nation. The court is unpersuaded by appellant's argument in support of its position. After reviewing the entire record, the court is compelled to conclude the bankruptcy court's order dated August 10, 1990, was not in error. In this court's opinion, said order was well reasoned and appellant has simply failed to present a cogent argument to the contrary. Accordingly,

IT IS HEREBY ORDERED that the August 10, 1990, order of the United States Bankruptcy Court for the District of Montana is hereby AFFIRMED.

DATED this 26th day of February, 1991.

/s/ Paul G. Hatfield, Chief Judge
United States District Court

APPENDIX C

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MONTANA

In re

RICHARD D. GREENE, and
DONNA JEAN GREENE,

Case No. 89-20544-007

Debtors.

ROSS RICHARDSON,

Plaintiff,

-vs-

Adversary Proceeding
No. 90/0023

MT. ADAMS FURNITURE,
Defendant.

ORDER

At Butte in said District this 10th day of August, 1990.

In this adversary proceeding, a Complaint to Set Aside a Preferential Transfer was filed by the Plaintiff/Trustee on February 6, 1990. The Defendant filed an Answer admitting the majority of allegations set forth in the Complaint, buy denying that this Court had jurisdiction to hear the matter. The Defendant grounds its jurisdiction claim on the fact that it is a wholly owned and managed enterprise of this Confederated Tribes and Bands of the Yakima Indian Nation (Tribe).

As such, the Tribe asserts that it is immune from suit based on its sovereignty as a recognized tribe. The parties have submitted Stipulated Facts and have filed simultaneous Briefs on this matter. The parties concede that the Plaintiff/Trustee's preference Complaint has merit. The sole issue before the Court is whether the Court has jurisdiction over the Defendant. If this Court finds jurisdiction, then the Plaintiff/Trustee will avail on the Complaint. As a general rule, Indian tribes are immune from suit in state or federal court. *Montana v. U.S.*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1676, 56 L.Ed. 2d 106 (1978); *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165. 171-73, 97 S.Ct. 2616, 2620-21, 53 L.Ed. 2d 677 (1977) [Puyallup III]; *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). In fact, a "[P]etitioner must exhaust available tribal remedies before instituting suit in federal court. . ." *Iowa Mutual life Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S.Ct. 971, 978, 94 L.Ed. 2d 10 (1987), following *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985). The "exhaustion rule" set forth in *Crow Tribe* and *LaPlante* is inapplicable to the present facts. Despite the strong language in *LaPlante* indicating that tribal courts have unlimited civil jurisdiction, this jurisdiction does not extend to bankruptcy proceedings. *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating*, 84 B.R. 638, 641 (D.S.D. 1988), referring to *LaPlante* at 107 S.Ct. 976. Jurisdiction of tribal courts is unlimited only as to matters of self-government. *U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13, 60 S.Ct. 653, 656 85 L.Ed. 894 (1940); *Turner v. U.S.*, 248 U.S. 354, 357-58, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919). As the district court in *Lower Brule* states:

> "Requiring tribal courts to perform as bankruptcy courts by requiring the tribal court to administer a debtor's estate would not promote self-government among the Indian tribes, even assuming that a body of "bankruptcy" law existed in tribal court. Thus, Indian tribal courts have

neither exclusive nor concurrent jurisdiction to hear bankruptcy proceedings. Because application of the exhaustion rule to cases filed in bankruptcy court would not serve the interest of community or judicial economy and would be an exercise in futility, the Court holds that the exhaustion rule of *Crow Tribe* and *LaPlante* does not apply to adversary proceedings in bankruptcy.

This result is analogous to the holding of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*. In that case, the Court decided that tribal courts do not have jurisdiction to prosecute non-Indians for criminal offenses. 435 U.S. 191, 212, 98 S.Ct. 1011, 1022, 55 L.Ed. 2d 209 (1978). In reaching this result, the Court noted that there are 'inherent limitations on tribal powers.' 435 U.S. at 209, 98 S.Ct. at 1021. In the absence of authorization from Congress for asserting such jurisdiction, the powers of the tribe must yield in keeping with the principle that the tribe must forfeit "full sovereignty in return for the protection of the United States." 435 U.S. at 211, 98 S.Ct. at 1022. The protection of non-Indian debtors by operation of the automatic stay of section 362 of the Bankruptcy Code must similarly figure into the equation, limiting the sovereignty of Indian tribes to assert jurisdiction over bankruptcy proceedings." 84 B.R. 641-42.

Numerous other bankruptcy courts, including this one, have held that bankruptcy courts have jurisdiction over Indian tribes. See, e.g., *In re Sandmar Corp.*, 12 B.R. 910 (Bankr. N.M. 1981); *In re Shape*, 25 B.R. 356 (1982); *In re Colegrove*, 9 B.R. 337 (Bankr. N.D. Cal. 1981). *Contra*; *C & R Wyoming Corp. v. Northern Arapaho Tribe, et al.*, Cause No. C89-0105 (D. Wyo. September 12, 1989).

By providing U.S. District Courts with original jurisdiction of all civil proceedings arising under Title 11, Congress has implied that U.S. District courts, rather than tribal courts, should administer bankruptcy estates and any actions arising under them. *Lower Brule*, at 643. Furthermore, the

Supreme Court has consistently held that the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses. See, *Puyallup III*, at 171-73, 97 S.Ct. at 2620-2621.

Accordingly,

IT IS ORDERED that the Defendant is subject to this Court's jurisdiction.

IT IS FURTHER ORDERED that the Plaintiff/Trustee have and recover judgment against the Defendant for $8,779.00.

/s/ JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, Montana 59703

APPENDIX D

III. STATUTORY AUTHORITY

A. 28 U.S.C. Section 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining form hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such sec-

tion applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

B. 28 U.S.C. Section 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

. . . . . .

(E) order to turn over property of the estate;

. . . . . .

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

---

11 U.S.C. Section 106:

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that

arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title [11 USCS Sections et seq.] that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

"Governmental Unit" is defined in section 101(24) as follows:

"[G]overnmental unit" means United States, State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(2)

Supreme Court, U.S.
FILED
DEC - 6 1993
OFFICE OF THE CLERK

No. 92-1398

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROSS RICHARDSON, CHAPTER 7 PANEL TRUSTEE,
PETITIONER

v.

MT. ADAMS FURNITURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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26 pp

QUESTION PRESENTED

Whether tribal sovereign immunity bars an adversary action under the Bankruptcy Code to recover the value of a preferential transfer from a business enterprise that is wholly owned and managed by an Indian Tribe and located on an Indian reservation.

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In the Supreme Court of the United States

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No. 92-1398

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PETITIONER

v.

MT. ADAMS FURNITURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Mt. Adams Furniture is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation. Its principal place of business is in Wapato, Washington, within the Yakima Reservation, where it constructs and sells furniture. It sold furniture on credit to Richard D. Greene and Donna J. Greene, the debtors in the underlying bankruptcy proceeding. The Greenes were doing business at the time as Custom Carpets in Townsend, Montana, outside the Reservation. Pet. App. A5; Br. in Opp. App. A1-A2.

When the Greenes failed to pay for the furniture, Mt. Adams peacefully repossessed some of it, valued by stipulation at $8779. Less than 90 days later, the Greenes petitioned for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Montana. The parties stipulated that the repossession was a preferential transfer under 11 U.S.C. 547. Pet. App. 5; Br. in Opp. App. A2.

2. Petitioner, the panel trustee for the District of Montana, commenced this adversary proceeding against Mt. Adams to avoid the transfer and to recover $8779 for the estate. Mt. Adams argued that it "[wa]s immune from suit by virtue of its status as a wholly owned enterprise of the Yakima Indian Nation." Br. in Opp. App. A2. The United States Bankruptcy Court for the District of Montana rejected that argument, holding that "the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses." Pet. App. A31. The bankruptcy court entered a judgment against Mt. Adams for $8779. *Ibid.*

Mt. Adams appealed that ruling to the United States District Court for the District of Montana, which affirmed. Pet. App. A26-A27.

2. a. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. A1-A25. It began by observing that, in the absence of congressional abrogation, Indian Tribes retain "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at A5, quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). It then determined that, at common law, sovereign immunity extended to the commercial activities of a sovereign, even if those activities occurred outside of the

sovereign's jurisdiction. Pet. App. A10-A11; see also *id.* at A15.

The court of appeals rejected petitioner's argument that this Court's decisions concerning the dependent status of Indian Tribes supported the adoption of a more restrictive view of tribal sovereign immunity than sovereigns enjoyed at common law. The court observed that "the dependent status analysis had not been used by the Supreme Court in cases involving claims of tribal immunity" (Pet. App. A14); instead, the dependent status of Tribes "has been a factor in the analysis of tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts." *Id.* at A14-A15. The court accordingly concluded that the Court's dependent-status analysis is inapposite here. *Ibid.*

The court of appeals also rejected petitioner's argument that a restrictive view of tribal sovereign immunity is justified by analogy to the restrictive scope of foreign sovereign immunity embodied in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* Pet. App. A10-A11. The court reasoned that that Act illustrated both Congress's recognition that legislation is necessary to limit the scope of foreign sovereign immunity at common law, and Congress's ability to enact such immunity-restricting legislation. *Id.* at A11 & n.3. In light of Congress's decision to limit the scope of foreign sovereign immunity, the court of appeals reasoned:

> congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes

> retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

Id. at A11.[1]

Finally, the court of appeals rejected petitioner's argument that Congress waived tribal sovereign immunity by granting bankruptcy courts exclusive jurisdiction over property of the bankruptcy estate in 28 U.S.C. 1334(d), or by waiving the sovereign immunity of "governmental units" in Section 106(c) of the Bankruptcy Code (11 U.S.C.). Relying on *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992), the court held that "[t]he bankruptcy court's jurisdiction over the property of the estate * * * does not operate to pierce the Yakima Nation's immunity from suit." Pet. App. A19. The court further held, also based on *Nordic Village*, that "the waiver of

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[1] The court of appeals further determined that the principles of comity that govern the immunity of one State from a suit in another State, enunciated in *Nevada* v. *Hall*, 440 U.S. 410 (1979), were inapposite in this case. Pet. App. A9-A10. The court explained (*ibid.*):

> The question in *Hall* was whether there was a constitutional impediment to California's application of its own [immunity] law as it existed in 1968, when the accident [that gave rise to the action] occurred, or whether it had to apply "the sovereign immunity doctrine as it prevailed when the Constitution was adopted" [quoting *Hall*, 440 U.S. at 418]. * * * In holding there was no Constitutional hindrance to the states' doing so, the Court left the extent of immunity between states to be resolved by the law of those states. But [the Court's] discussion also recognized that immunity between sovereigns at the common law was much broader than it is now, particularly as it relates to commercial enterprises.

sovereign immunity accomplished by § 106 does not extend to actions for money damages against Indian tribes," *id.* at A18, even assuming that Indian Tribes are "governmental units" for purposes of Section 106.

b. Judge Rymer concurred in a separate opinion. Pet. App. A20-A25. She agreed that neither the grant of jurisdiction to bankruptcy courts nor Section 106 of the Bankruptcy Code waived tribal sovereign immunity from a money judgment. Pet. App. A20. She also agreed that the common law followed a "rule * * * of absolute immunity." *Id.* at A21. She wrote separately, however, to express her view that, as the case had been briefed, it was not necessary to resolve the question whether the scope of tribal sovereign immunity at common law could be, and had been, restricted by later judicial decisions to exclude immunity for commercial activities. *Id.* at A20.

DISCUSSION

This case presents a narrow issue: whether a bankruptcy court may entertain a claim based on the Bankruptcy Code seeking a money judgment against a tribal commercial enterprise. The court of appeals correctly held that such a claim is barred by tribal sovereign immunity. That decision does not conflict with any decisions of this Court, other federal courts of appeals, or state courts of last resort. Further review is therefore unwarranted.

1. The court of appeals' decision is faithful to this Court's decisions on tribal sovereign immunity. The court correctly held that, as a tribal business located on the Yakima Reservation, Mt. Adams is immune from this adversary action in the absence of an Act of Congress waiving tribal sovereign immunity. The court also correctly held that Section 106 of the

Bankruptcy Code does not effect such a waiver. Finally, the court correctly rejected petitioner's argument that tribal sovereign immunity is, or should be, judicially limited by reference to the dependent status of Indian Tribes or by analogy to this Court's decisions concerning foreign sovereign immunity.

a. This Court has repeatedly held that an Indian tribe is immune from suit without its consent unless Congress unequivocally waives that immunity. Most recently, the Court stated that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). That statement reflects longstanding precedent. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); see also *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877, 890-891 (1986); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895). Petitioner contends, however, that Mt. Adams is not entitled to tribal sovereign immunity because it is a commercial enterprise that sells goods to nonmembers of the Tribe off the Yakima Reservation. See Pet. 7-9. The court of appeals correctly rejected that contention.

i. *Potawatomi* makes clear that tribal sovereign immunity bars an action for monetary relief against a tribal business located on a reservation, even if the action is based on the Tribe's commercial dealings

with nonmembers. *Potawatomi* concerned a convenience store owned and operated by the Citizen Band Potawatomi Indian Tribe of Oklahoma on land held in trust for the Tribe by the United States. 498 U.S. at 507. The Oklahoma Tax Commission sought to recover $2.7 million from the Tribe for taxes on cigarettes that the store had sold to nonmembers. *Ibid.* This Court held that, although the Tribe could be required to collect state taxes on future cigarette sales to nonmembers, tribal sovereign immunity barred a money judgment against the Tribe for the unpaid taxes on past sales to nonmembers. *Id.* at 509-511, 514.

The Court in *Potawatomi* refused the State's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State had argued that "tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense [and] should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.* The Court rejected that argument, observing that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it." *Ibid.* The Court thus found it significant that, "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes," it has never authorized actions to enforce tax assessments, but has instead "consistently reiterated its approval of the immunity doctrine." *Ibid.* The Court accordingly concluded that, if the State found existing means of enforcing its tax laws inadequate, the proper forum in which to seek relief was Congress. *Id.* at 514.

ii. Tribal sovereign immunity was not compromised in this case by the fact that the furniture sold by Mt. Adams to the debtors was outside the Reservation at the time it was repossessed. This Court made clear in *Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165, 167 (1977), that a plaintiff cannot circumvent a Tribe's immunity from suit by alleging that the conduct on which a suit is based had an off-reservation impact. In *Puyallup*, a Tribe challenged, on sovereign immunity grounds, a state-court judgment "recit[ing] that the court had jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation." This Court held that the challenge was "well founded" to the extent that "the claim of sovereign immunity is advanced on behalf of the Tribe." *Id.* at 167-168. The Court accordingly vacated "the portions of the state-court order that involve[d] relief against the Tribe." *Id.* at 173. The Court did not distinguish the Tribe's on-reservation activities from its off-reservation activities for purposes of determining its immunity.[2] Furthermore,

[2] Similarly, in *United States Fidelity & Guaranty Co.*, the Court indicated that the sovereign immunity of the Choctaw and Chickasaw Nations barred a cross-claim against them "even after dissolution of the tribal government." 309 U.S. at 512; cf. *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (Tribe retains authority over inheritance of non-reservation, non-trust property). This Court has stated that individual members of a Tribe, as opposed to the Tribe itself, are subject to "nondiscriminatory state law otherwise applicable to all citizens of the State" for off-reservation conduct. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973); see also *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). The Court has also suggested that tribal sovereign immunity might not protect tribal officials from injunctive relief in certain circumstances. See *Potawatomi*, 498 U.S. at 514. This case, however, concerns the propriety of monetary,

more, the congressional policy of fostering tribal economic development and financial independence would be seriously threatened by money judgments against Indian Tribes, see *Potawatomi*, 498 U.S. at 510, whether the conduct giving rise to the suit occurred on the reservation or off.

b. Petitioner further contends (Pet. 13-14) that Congress waived tribal sovereign immunity from adversary actions in Section 106 of the Bankruptcy Code. The court of appeals correctly concluded that that contention is foreclosed by this Court's decision in *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992).[3]

Sections 106(a) and 106(b) are inapplicable on their face. As this Court explained in *Nordic Village*, those provisions waive the sovereign immunity of a governmental unit "only when the [governmental

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not injunctive, relief, and it involves a suit directly against a tribal entity, not individuals. As a result, this case provides no occasion for addressing a bankruptcy court's authority to enter injunctive or other non-monetary forms of relief against a Tribe or tribal officials. Compare *In re Shape*, 25 Bankr. 356, 358-360 (Bankr. 1982) (bankruptcy court had jurisdiction in action involving members of a Tribe to determine whether land held for them in trust by federal government was an asset of estate of debtors who had leased the trust land), and *In re Sandmar Corp.*, 12 Bankr. 910, 912-917 (Bankr. 1981) (civil contempt order entered against Tribe that filed proof of claim against the estate), cited in Pet. 14.

[3] As discussed above (see page 4, *supra*), in the court of appeals, petitioner contended that Congress also waived tribal sovereign immunity in 28 U.S.C. 1334(d), which grants bankruptcy courts exclusive jurisdiction over property of the bankruptcy estate. The court of appeals correctly rejected that contention, Pet. App. A18-A19, and petitioner does not renew it in this Court.

unit] has filed a proof of claim" against the estate. 112 S. Ct. at 1015. They do not apply here because no claim against the estate was filed by Mt. Adams or any other tribal entity or official. Pet. App. A17; cf. *In re Sandmar Corp.*, 12 Bankr. 910, 915 (Bankr. 1981) (Tribe waived sovereign immunity by filing proof of claim against estate).

Section 106(c) is likewise inapplicable. In *Nordic Village*, this Court held that Section 106(c) does not waive a governmental unit's sovereign immunity from monetary relief. 112 S. Ct. at 1015-1016. Thus, as the court of appeals correctly held, subsection (c) does not waive tribal immunity from the money judgment entered against Mt. Adams by the bankruptcy court. Pet. App. A18.

c. Petitioner further contends that, even in the absence of a statutory waiver of sovereign immunity, federal courts may impose restrictions on the scope of tribal sovereign immunity. The court of appeals properly rejected that contention. Pet. App. A7-A15.

As discussed earlier, this Court has made clear that federal waivers of tribal sovereign immunity from suit require an unequivocally clear expression of Congress. See page 6, *supra*. Thus, the Court in *Potawatomi* refused to modify the doctrine of tribal sovereign immunity to exclude commercial activities, in light of Congress's general approval of the doctrine as originally enunciated[4] and its demonstrated ability

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[4] See 25 U.S.C. 450n (nothing in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, which establishes the framework of financial assistance for Tribes in furtherance of Congress's " 'overriding goal' of encouraging tribal self-sufficiency and economic development," *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987), shall be construed as "affecting, modifying, diminishing, or

to modify that doctrine by legislation in "limited classes of suits against Indian tribes." 498 U.S. at 510.[5] In other decisions involving tribal immunity, the Court has similarly emphasized that "Congress' authority over Indian matters is extraordinarily

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otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"); cf. 25 U.S.C. 450f(c).

[5] See, *e.g.*, *United States Fidelity & Guaranty Co.*, 309 U.S. at 509, 513; *Green* v. *Menominee Tribe*, 233 U.S. 558, 568-570 (1914); *United States* v. *Gorham*, 165 U.S. 316, 320-322 (1897); *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1.

Of particular relevance here, Congress has provided for suits against Indian Tribes for commercial activities under certain limited circumstances, which we are advised do not obtain in this case. In the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Courts have construed such clauses to waive the immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir. 1986). Such a waiver, however, is limited to the business dealing and assets under the control of that corporation and does not extend to the Tribe in its sovereign capacity, as organized under Section 16 of the IRA. See, *e.g.*, *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); see also R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 325-326 (1982). Counsel for Mt. Adams has advised us that Mt. Adams is not chartered under Section 17 of the IRA, and the parties cite no charter or other provision adopted by the Tribe that waives the immunity of Mt. Adams in the manner of the charter provisions at issue in those other cases.

broad." *Santa Clara*, 436 U.S. at 72. The decisions upon which petitioner relies do not justify a different approach here.

Petitioner relies primarily (Pet. 7-9, 14) on decisions in which this Court has recognized limits on tribal authority by virtue of the Indian Tribes' dependent status within the federal system.[6] Those decisions are inapposite. As the court of appeals recognized, this Court has applied the dependent-status principle only in cases concerning application of a Tribe's laws and regulations to others, and not in cases involving assertions of tribal sovereign immunity from suit. Pet. App. A14. Petitioner provides no justification for extending the principle to the latter class of cases. As petitioner's quotations from *United States* v. *Wheeler* and *Montana* v. *United States* show, the Court has held that the affirmative assertion of a Tribe's regulatory powers over non-members may be divested by "implication." See Pet. 8-9 (quoting *Wheeler*, 435 U.S. at 323, and *Montana*, 450 U.S. at 465). By contrast, only an explicit Act of Congress is sufficient to divest a Tribe of the

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[6] In *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978), the Court stated that Indian Tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." See also *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153-154 (1980). The Court has found an implicit divesture of tribal authority in certain cases in which a Tribe has sought to regulate the conduct of non-members. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544 (1981) (nonmember hunting and fishing on nonmember fee lands within the reservation); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Tribes lack criminal jurisdiction over non-Indians); see also *South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2319-2320 (1993).

protection of sovereign immunity against suits by others. *Potawatomi*, 498 U.S. at 509.

Petitioner also errs in relying (Pet. 6) on the "restrictive view" of foreign sovereign immunity codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, which subjects foreign sovereigns to liability for certain commercial activities. See, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2165 (1992). Unlike the restriction on tribal immunity that petitioner urges this Court to adopt, the commercial-activity restriction on foreign sovereign immunity did not originate in the courts. The "restrictive" theory of foreign sovereign immunity was originally adopted by the State Department. *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 487 (1983). The State Department's position was then binding upon the courts under the principle that "[i]t is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). The exception to foreign sovereign immunity that permits suits arising out of certain commercial activities then was enacted by Congress in the Foreign Sovereign Immunities Act. *Verlinden*, 461 U.S. at 487-489.

Thus, the commercial-activity exception is based on a considered and controlling judgment by the political Branches—first the Executive and then Congress—that a weighing of the competing considerations warranted dispensing with the immunity of a foreign sovereign under the specified circumstances. See *Verlinden*, 461 U.S. at 487. The experience in the analogous context of foreign sovereign immunity therefore cuts against the notion that the courts may

fashion restrictions on tribal sovereign immunity that Congress has not enacted.

2. Petitioner claims (Pet. 4, 11) that the decision below conflicts "in principle" with decisions of other federal courts and state courts. Petitioner fails to establish a conflict warranting this Court's review.

a. The two decisions of federal courts of appeals cited by petitioner (Pet. 10-11) are inapposite.

Petitioner asserts that the court in *North Dakota-Montana Wheat Growers' Ass'n* v. *United States*, 66 F.2d 573 (8th Cir. 1933), cert. denied, 291 U.S. 672 (1934), "impliedly conceded that a government is not immune from suit where it organizes and operates * * * a business corporation." Pet. 10. That assertion is incorrect. The Eighth Circuit held in *Wheat Growers* that sovereign immunity barred a counterclaim against the Federal Farm Board in a suit by the government to foreclose on the property securing a government loan. 66 F.2d at 577-578. In so holding, the court rejected the argument that the government had waived its sovereign immunity by engaging, through the Farm Board, in the "strictly private business" of making commercial loans:

> In the application of the principle that the sovereign is immune from suit in its own courts, no distinction has been drawn between strictly "governmental functions" and those which partake in part of the nature of ordinary private business. When the sovereign itself is sued, the immunity is absolute, regardless of the functions out of which the suit arose, and the suit can only be maintained by the sovereign's consent.

Id. at 578. Thus, far from conflicting with the decision below, *Wheat Growers* supports the Ninth

Circuit's conclusion that a sovereign's immunity from suit extends to suits based on commercial activities.

Nor is there any conflict between the decision below and the Tenth Circuit's decision in *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). The Tenth Circuit there held that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, dispensed with a Tribe's sovereign immunity from an action for money damages brought under that Act by a nonmember who had no remedy in a tribal forum. *Dry Creek Lodge*, 623 F.2d at 684-685. In our view, that holding is plainly inconsistent with *Santa Clara Pueblo*, which held that suits against a Tribe under the ICRA are barred by sovereign immunity, 436 U.S. at 58-59. Moreover, *Dry Creek Lodge* is based on the spurious premise that "there ha[d] to be a forum where the dispute can be settled," 623 F.2d at 685; the very purpose of sovereign immunity is to protect the sovereign from suits in *any* court, unless immunity has been waived. Not surprisingly, in subsequent decisions, the Tenth Circuit has avoided following *Dry Creek Lodge* by reading it very narrowly.[7] Under these circumstances, there is no reason to believe that the Tenth Circuit would follow *Dry Creek Lodge* if presented with this case, which is based, not on the ICRA, but on the Bankruptcy Code.

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[7] See, *e.g.*, *Bank of Oklahoma* v. *Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (1992); *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1460 (1989); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1312 (1984); *Ramey Constr. Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 319 (1982).

b. The state-court decisions cited by petitioner (Pet. 12) are likewise inapposite.

In *Padilla* v. *Pueblo of Acoma*, 754 P.2d 845, 846 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), a roofing consultant brought a state-law breach of contract claim against a tribal business for work it had performed on two building projects located off the reservation. The New Mexico Supreme Court framed the issue before it as "whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct." 754 P.2d at 847. The court considered that issue to be analogous to the issue whether a court of one State may exercise jurisdiction over another State in a suit against the latter based on its conduct in the former's jurisdiction. The court gleaned from *Nevada* v. *Hall*, 440 U.S. 410 (1979), the principle that "there is no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states." *Padilla*, 754 P.2d at 850. "Therefore," the *Padilla* court reasoned, "the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Ibid.* Based on the similarity it perceived between state-court jurisdiction over other States and state-court jurisdiction over Indian Tribes, the court in *Padilla* held that a state court's "exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." *Ibid.* Because the State of New Mexico had waived its own sovereign immunity from suits in New Mexico based on the breach of a written contract, the court concluded that principles of comity did not bar such suits against Indian Tribes. *Id.* at 850-851.

As the Ninth Circuit observed, "[t]he issues involved in the *Padilla* case [we]re not before [the Ninth Circuit in this case]." Pet. App. A11. At issue in *Padilla* was whether a state court had jurisdiction over a state-law claim against a Tribe; in contrast, at issue here is whether a federal bankruptcy court has jurisdiction over a claim against a Tribe based on the federal Bankruptcy Code. The latter issue is plainly governed by federal law, and not by principles of comity. Moreover, even if *Padilla*'s comity rationale were applicable in the present case, it would not support jurisdiction over petitioner's claim against Mt. Adams. Applied here, a comity rationale would accord an Indian Tribe the same immunity as the federal government possesses in bankruptcy court. Under *Nordic Village*, the federal government plainly would be immune from a monetary judgment under the circumstances of this case. See 112 S. Ct. at 1015-1016; see also pages 9-10, *supra*. The reasoning of *Padilla* would thus lead to the conclusion that the Tribe is immune from money judgments, which is the same conclusion that the Ninth Circuit reached.[8]

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[8] That is not to say that we agree with the decision in *Padilla*, but only that there is no square conflict between that decision and the Ninth Circuit's decision in this case. Indeed, we believe that the Ninth Circuit properly criticized *Padilla* on the ground that the New Mexico court "should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law." Pet. App. A11. As the New Mexico Supreme Court itself recognized, "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states." *Padilla*, 754 P.2d at 847 (citing *Three Affiliated Tribes* v. *Wold Engineering*, *supra*). Furthermore, the New Mexico Supreme Court's reliance (*id.* at 850) on *Nevada* v. *Hall*, 440 U.S. 410 (1979), was misplaced. There, the Court invoked the proposition that recognition of sovereign

Petitioner also cites (Pet. 12) *Dixon* v. *Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989). The Arizona Supreme Court held in *Dixon* that tribal sovereign immunity did not protect a corporation that was organized under tribal law, and all of the shares of which were owned by the Tribe, from a tort action based on an automobile accident that occurred off the reservation. *Id.* at 1107-1112. *Dixon*, like *Padilla*, is distinguishable from the present case because it concerned the exercise of state-court jurisdiction over a state-law claim. Moreover, the court in *Dixon* based its holding on a determination that the corporate defendant was not a "subordinate economic organization" of the Tribe, but was, instead, a "non-tribal business." *Id.* at 1109-1111. The *Dixon* court accordingly distinguished the case before it from prior cases in which Arizona courts had dismissed actions against "tribal business[es]" that were found to be "subordinate economic organization[s]" of a Tribe. *Id.* at 1108-1111 (citing *White Mountain Apache Indian Tribe* v. *Shelley*, 480 P.2d 654 (Ariz.

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immunity between coordinate sovereignties (*e.g.*, two independent nations) is a matter of comity between them, *id.* at 414-418, and concluded that federal law did not afford independent protection for one State in the courts of another, *id.* at 418-427. Here, by contrast, the States and Indian Tribes are distinct sovereign entities without mutuality of concessions under our constitutional framework, *Blatchford* v. *Native Village of Noatak*, 111 S. Ct. 2578, 2582-2583 (1991), and federal law does afford special protection for Indian Tribes as against the States, *id.* at 2583; *Potawatomi*, 498 U.S. at 510, 514; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). In any event, we agree with the Ninth Circuit's determination that *Padilla* is inapposite. Pet. App. A11. We also note that, in the five years since it was decided, *Padilla* has not been followed in any other reported judicial decision of which we are aware.

1971); *S. Unique, Ltd.* v. *Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983), review denied (Jan. 4, 1984); and *Graves* v. *White Mountain Apache Indian Reservation*, 570 P.2d 803 (Ariz. Ct. App. 1977), cert. denied, 436 U.S. 931 (1978)).

The limited record in this case makes it impossible to determine whether Mt. Adams would be regarded as a "subordinate economic organization" under the principles applied by the Arizona Supreme Court in *Dixon*.[9] Thus, no clear conflict emerges between *Dixon* and the decision below. Moreover, the limited record makes this an inappropriate vehicle for resolving any conflict in approach, exemplified in *Padilla* and *Dixon*, that may exist between the courts of New Mexico and those of Arizona. Cf. *Pueblo of Acoma* v. *Padilla*, 490 U.S. 1029, 1029-1030 (1989) (White, J., dissenting from denial of certiorari). The decision of the Ninth Circuit in this case is correct and, because it arises under the federal Bankruptcy Code, is distinguishable from both the *Padilla* decision and the *Dixon* decision in those States. Review by this Court therefore is not warranted.

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[9] The stipulation merely states that "Mt. Adams Furniture * * * is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation." Br. in Opp. App. A2. There is no information concerning Mt. Adams' status as an incorporated or unincorporated organization, the purpose or circumstances of its formation, the degree of tribal control, the relationship of its funding to the tribal treasury, or whether the Tribe has accepted or disclaimed liability for the enterprise's debts. Cf. *Dixon*, 772 P.2d at 1109-1111 (listing these factors as relevant to determining whether a business is protected by the Tribe's immunity).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1398

In The

Supreme Court of the United States

October Term, 1992

IN RE:

GREENE, RICHARD D. and DONNA J.,
husband and wife,

Debtors.

ROSS RICHARDSON, Chapter 7 Trustee,

Petitioner,

v.

MT. ADAMS FURNITURE,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Bankruptcy Act, by clear and unequivocal language, abrogate the sovereign immunity of an otherwise immune Indian Nation?

2. Does Section 106(e) of the Federal Bankruptcy Act, by clear and unequivocal language, subject otherwise immune Indian Tribes to suit for the entry of money judgment?

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No. 92-1398

In The

Supreme Court of the United States

October Term, 1992

IN RE:

GREENE, RICHARD D. and DONNA J.,
husband and wife,

Debtors.

ROSS RICHARDSON, Chapter 7 Trustee,

Petitioner,

v.

MT. ADAMS FURNITURE,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF CASE

While petitioner's statement accurately reflects the majority of the facts, it is important for the Court to understand the case somewhat more precisely. This is not a case involving an issue of major proportion in the Nation or in Indian Country. Instead, it is a rather unique,

fact-bound issue involving a situation which will rarely arise again. The issue before the Ninth Circuit was narrowly drawn, and dealt solely and specifically with the Federal Bankruptcy Act. The issue here is governed by the terms of the Bankruptcy Act, particularly section 106(c) and its potential effect upon tribal sovereign immunity from suit under that act, as defined in the Ninth Circuit's opinion, and the opinions of this Court.

This is not a situation in which the Yakima Nation is attempting to assert its jurisdiction or authority over non-Indians, or to take some extra-territorial action against non-Indians. Instead, it is a case in which the Yakima Nation has simply raised the defense of sovereign immunity to a lawsuit to recover money judgment brought by the trustee in bankruptcy. The Yakima Nation filed no claim in the Bankruptcy, and did nothing which subjected itself to the jurisdiction of the Bankruptcy Court.

Both the Bankruptcy Court and the District Court improperly interpreted the law and the facts of the case in reaching their determinations. The Bankruptcy Court analyzed the situation as though the Yakima Nation was asserting Tribal Court jurisdiction over the situation or had taken other affirmative action. As the stipulated facts before that Court reflect (Appendix A hereto), there was never any question of Tribal Court action, or any other attempt by the Yakima Nation to assert any form of jurisdiction over their proceedings.

The Ninth Circuit's well reasoned opinion clearly recognized this situation and properly analyzed the case strictly from the standpoint of Tribal Immunity from suits

for money judgments such as those resulting from a claim of a bankruptcy preference.

As is noted in our statement of the questions presented, the issues here are the existence of tribal common law sovereign immunity from suit and whether Congress, by clear and unequivocal language in the Bankruptcy Act has abrogated that immunity. The Ninth Circuit in a well reasoned and proper opinion, determined that the Yakima Nation, under its sovereign retained power was immune from suit without clear and unequivocal action by Congress. It then found that the bankruptcy code, and particularly section 106(c), had not abrogated that immunity. It's decision is a proper statement of the law and does not warrant Certiorari.

BASES FOR DENIAL

I. The petitioner fails to set forth an adequate basis under rule 10 for granting the Writ.

Petitioner have requests that the Court grant its Writ to "resolve conflicts *in principle*" among the Federal Courts. Rule 10 clearly reflects that conflicts between Circuits be "on the same matter" and accordingly must be direct. The same is true of conflicts with opinions of State Courts of last resort. Nowhere in Rule 10 is there a provision allowing a grant of Certiorari on the basis of "conflicts in principle". Petitioner provides no citation or authority providing a basis for his argument regarding "conflicts in principle".

Respondent submits that before the Court exercises its extraordinary authority, that a petitioner should be held to exhibit actual and direct conflicts between Courts "on the same matter" as reflected in Rule 10. As is noted *infra,* Petitioner cited no direct instances of conflict on the precise issue of tribal immunity here presented. He cites no case by this Court or the Circuit Courts that hold that Yakima immunity has been abrogated by clear and unequivocal action of Congress.

Accordingly, this Court should deny that Petitioner's "conflict in principle" argument is a sufficient basis for granting of the Writ.

II. The Federal Law on tribal sovereign immunity from suits for money judgments is clear and well defined; this case presents no issue which requires further clarification from the Court.

This case presents no important question of Federal Law which has not been settled by this Court. This Court has previously concluded and clearly defined the law pertaining to the existence of tribal common law sovereignty from suit and the legal requirement necessary to affect a waiver or abrogation of that immunity. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Oklahoma Tax Commission v. Potowatomi Tribe,* 498 U.S. ___, 111 S.Ct. 905, 112 L. Ed.2d 1112 (1991). The rule of this Court has been that the Tribes have retained the common law sovereignty they possessed as Sovereigns at the time of their treaties. In order to find an alteration or abrogation of that sovereignty, there must be "unequivocal" action by Congress specifically dealing with the sovereignty issue. Here the

Ninth Circuit followed this Court's cases on the issue and properly found no "unequivocal" abrogation of the Yakima Nation's immunity from suit. Action by this Court is not necessary, for the Ninth Circuit's opinion reaches the same conclusions as the opinions of this Court.

III. The decision of the Ninth Circuit does not conflict with decisions of this Court.

The decision of the Ninth Circuit carefully and completely analyzed the opinion of this Court on the issues of both the United States Common Law Immunity (Petitioner's Appendix A, pages 12-15) and its rulings on the existence of tribal immunity absent congressional actions to dissolve it.

In its analysis, the Ninth circuit properly determined that at the time of the Yakima Treaty in 1855, Indian Nations were, under the decisions of this Court, sovereign nations, properly recognizing the principles set forth by this Court in *Worcesta v. Georgia*, 31 U.S. 515 (1805), and continuing through the recent decision in *Oklahoma Tax Commissioner v. Citizens Band of Potowatomi*, 498 U.S. ___, 111 S.Ct. 905, 112 L.Ed 2d 1112 (1991). The Ninth Circuit then analyzed the status of common law sovereign immunity at Yakima Treaty time, stating that:

> Contemporaneously with Senate ratification of the Treaty with the Yakimas in 1859 (12 Stat. 951), the Supreme Court said, "[i]t is *an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission . . . " Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

(Petitioner's Appendix A, page 12 n.4)

It then determined, consistent with every ruling of this Court on the subject, that the Yakima Nation, pursuant to its Treaty, had retained its common law sovereign immunity from suit, as set forth in *Beers, supra,* subject only to the power of Congress to abrogate that immunity. It specifically analyzed this Court's decisions in *United States v. United States Fidelity and Guaranty Company,* 309 U.S. 506 (1939); *Puyallup Tribe v. Department of Game,* 433 U.S. 165 (1977) (Puyallup III); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) and *Potowatomi, supra,* and held that unless the bankruptcy trustee could point to a clear and unequivocal congressional abrogation, the Yakima Nation's immunity from suit had not been abrogated. The Ninth Circuit relied specifically on this Court's holding in *Puyallup Tribe v. Department of Game,* 433 U.S. 165, at 167-168, to determine that this Court had, at least, impliedly, recognized that tribal immunity existed both on and off the *reservation.* It then looked at the recent decision in *Potowatomi, supra,* and adopted its language that:

> Congress has always been at liberty to dispense with such Tribal Immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, *it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine.* . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government", including its "overriding goal" of encouraging tribal self-sufficiency and economic development. . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity. *Oklahoma Tax Commission v.*

> *Potowatomi Tribe*, 498 U.S. ___, 112 L. Ed.2d 1112, 1120-21 (emphasis supplied).

The Ninth Circuit then concluded, in language consistent with the holdings of this Court in *Puyallup, III, supra, Santa Clara Pueblo v. Martinez, supra, U.S. v. U.S. Fidelity and Guaranty Company, supra,* and *Potowatomi, supra,* that:

> We conclude from the above analysis that Sovereign Immunity, as it existed at common law, had an extra territorial aspect. 'The Common Law Sovereign Immunity possessed by the Tribe is a necessary incident to Indian Sovereignty and self government'. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

(Petitioner's Appendix A, page 15)

This conclusion is well reasoned and consistent with the opinions of this Court on Tribal claims of sovereign immunity from suits for money judgments. There is no conflict with this Court's immunity decisions which warrant a grant of Certiorari.

IV. The decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is not in conflict with this decision.

Petitioner submits that the holding by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is in conflict with the Ninth Circuit opinion. Respondent disagrees on several bases.

First and foremost, petitioner misconstrues *Mescalero's* holding as to the issue of the Apache Tribe's immunity. He argues that this Court's determination of Mescalero's *liability* for the payment of some state taxes for off-reservation activities equates with a waiver of the

Tribe's immunity from an action to physically *collect* these taxes. A clear reading of the *Mescalero* opinion reflects that this Court never reached that issue. The sole issue before the court was whether New Mexico could *levy and assess* taxes against the Apache business operation because of it's off-reservation status. The Court never reached the question of collection and direct action for collection against the Tribe itself.

This Court limited its ruling to the narrow facts of the case before it, specifically finding that it was the Apache Tribe's Ski Resort, not the Tribe itself, that was subject to the tax:

> We therefore hold that the exemption in Section 465 does not encompass or the collection of nondiscriminatory gross receipts tax and that the *Tribe's ski resort* is subject to that tax. (411 U.S. 145, 158). (emphasis added).

The issue of direct colletion action against the Tribe was never included. Had it been, respondent submits that the result would have been consistent with the Ninth Circuit opinion, and this Court's opinion in *Potowatomi, supra,* where the Court found Tribal tax *liability,* but no congressional action which abrogated tribal immunity to allow *collection* directly from the Tribe:

> Congress has always been at liberty to dispense with such Tribal Immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian Tribes, it has never authorized suits to enforce tax assessments. (*Potowatomi, supra* at 112 L.Ed 1112, 1120)

Clearly there is no conflict with the opinion in *Mescalero, supra,* regarding Tribal immunity from direct suit to collect

a money judgment. *Mescalero* did not reach the issue, but if it had, this Court's opinion in *Potowatomi* makes it clear what the decision would have been.

Further, *Mescalero* is distinguishable on the basis that this Court impliedly found that Congress, through approval of the New Mexico State Enabling Act, allowing for taxation of off-reservation acts of Indians, had authorized the tax assessment in *Mescalero*. That is not the case here. The Ninth Circuit specifically found *no* Congressional action which has limited tribal immunity from suit. As is argued *infra*, this Court, in construing section 106(c) of the Bankruptcy Act, has found that it does not, for purposes of State and Federal Sovereign Immunity, effect an abrogation for purposes of money judgments for bankruptcy preferences. Accordingly section 106(c) does not abrogate any tribal immunity.

Finally, Petitioner cites *Mescalero* as this Court's ultimate statement that tribal activities outside reservations, with non-Indians, automatically subjects the tribes to blanket waivers of their sovereignty. *Mescalero* does not so hold, and in fact found that a portion of the Apache Tribe's off-reservation activities were exempt from State taxation:

> In view of Section 465, these pertinent improvements of the Tribe's tax exempt land would certainly be immune from the State's ad valorem property tax. *Mescalero, supra,* at 411 U.S. 145, 158.

Just as the Ninth Circuit did in it's opinion in analyzing congressional acts which might have affected Yakima Tribal immunity, this Court, by looking to Federal law, determined that a portion of the Mescalero Tribe's off-

reservation activities were in fact immune from State taxation. While the facts are somewhat different from the case at bar, *Mescalero* cannot be said to provide a "blanket" holding that *all* off-reservation activities with non-Indians automatically constitute a waiver of tribal immunity. The Ninth Circuit carefully analyzed this situation and correctly rendered a decision consistent with the opinion of this Court in *Mescalero*.

V. This opinion does not conflict with the Tenth Circuit opinion in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), or any other decision of the Circuits.

Petitioner submits that the decision in *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980) and the opinion here before the court are in conflict, thereby warranting Certiorari.

Petitioner alleges that the *Dry Creek* holding, like his argument regarding *Mescalero*, provides a "blanket" rule that tribal dealings with non-Indians somehow results in waivers of tribal immunity, without any showing of congressional action to affect the immunity. Respondent submits that the *Dry Creek* ruling was based specifically upon a Federal statute, the Indian Civil Rights Act (ICRA), which the Court there found had abrogated, or at least limited, sovereign immunity. Accordingly, it is readily distinguishable from this case, in which the Ninth Circuit found that the Bankruptcy Act *had not* abrogated Yakima immunity.

The *Dry Creek* Court was dealing with an issue involving an egregious violation of the civil rights of non-Indian, citizens of the Wind River reservation. In reaching

its ruling, the Court engaged in a lengthy analysis of the Indian Civil Rights Act, 25 USC 1301 et seq. (ICRA) as it was discussed by this Court in *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978). In a rather stilted analysis, the Tenth Circuit found that this Court, in *Martinez*, had found no waiver of sovereign immunity by ICRA only because Martinez, as a tribal member, had access to redress within the tribal process:

> With the reliance on the internal relief available, the Court in *Santa Clara* placed the limitations on the ICRA as a source of a remedy. *Dry Creek*, 635 F.2d 682, 685.

The Tenth Circuit then went on to find that under the facts before it, the non-Indian plaintiffs could enjoy none of the internal tribal remedies available to *Martinez* as a tribal member, and accordingly, without a determination that ICRA allowed them a remedy, plaintiffs had no recourse for the violation of their civil rights:

> But in the absence of such relief or remedy the reason for the limitations disappears. *Dry Creek* at 685.

The *Dry Creek* Court necessarily found, that as to the acts of the tribes vis-a-vis non-Indians who had no internal tribal remedy, that ICRA had "unequivocally expressed" an abrogation or limitation of tribal immunity under the *Dry Creek* facts. The *Dry Creek* ruling found an abrogation or limitation of sovereign immunity not because of "dealings with non-Indians" as Petitioner submits, but instead because in its opinion ICRA had abrogated or limited the immunity.

This interpretation of the Court's opinion in *Dry Creek* is reinforced by the subsequent Tenth Circuit

opinion of *Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F2d 315 (10th Cir. 1982). In *Ramey*, the Court noted that the plaintiff relied "heavily" upon the *Dry Creek* opinion, claiming that tribal contractual dealings with non-Indians constituted a waiver of sovereign immunity. The Tenth Circuit denied this claim, holding that *Dry Creek* was a statutory interpretation case involving Congress's action under ICRA, facts which were not present in the *Ramey* decision:

> In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the Supreme Court clarified the meaning and effect of § 1302 of the ICRA. The Court made clear that, aside from authorizing writ of habeas corpus actions as provided in § 1303, the ICRA leaves tribal Sovereign Immunity intact. *Id.* at 59, 98 S.Ct. at 1677. In this action, Ramey has alleged a claim for damages based on breach of contract. This type of injury does not rise to the level of a constitutional deprivation to be redressed under the ICRA. (footnote 4) *Therefore, the ICRA neither provides a jurisdictional basis for Ramey's claims nor waives the Tribe's Sovereign Immunity.*
>
> At footnote 4, the Ramey Court noted:
>
> Ramey relies heavily on *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action.

Clearly the Tenth Circuit, in the subsequent *Ramey* decision, recognizes that *Dry Creek*, contrary to petitioner's assertions, did not create a "blanket" waiver of

tribal immunity without any showing of unequivocal Congressional action. It held precisely that *Dry Creek* was a statutory interpretation case involving ICRA, not a holding that dealings with non-Indians *per se* created a waiver of tribal immunity.

The case at bar properly finds Yakima Tribal retention of sovereign immunity, and finds that the Bankruptcy Act has not abrogated it. *Dry Creek* is no different, except that it found a Federal statute, ICRA, that had at least limited tribal sovereign immunity, thereby allowing the suit against the Tribe. The cases are identical in determining that immunity exists unless modified by congress. They differ only due to different facts and different statutes. This is not a conflict of decisions, but instead determinations by two Courts dealing with different issues and different facts. Their existence does not warrant Certiorari.

As the Court in *Ramey, supra,* reflects, there is no confusion in the Tenth Circuit that tribal immunity exists unless abrogated by "Congressional" action of Congress. Nothing in *Dry Creek, supra,* or *Ramey, supra,* lead to a contrary conclusion. Petitioner points to no other Circuit opinion which is in conflict. *Dry Creek, supra,* does not warrant a Writ of Certiorari.

VI. The Ninth Circuit properly analyzed Federal Law in reaching its conclusion and properly analyzed and dealt with State Court opinions in a manner which provides clarity to issues of tribal immunity from suit.

This action involves the ability of a Federal Bankruptcy Act Trustee to obtain a money judgment against an Indian Tribe. The question before the Ninth Circuit, as it properly perceived it, was one based solely on Federal

Law, (Petitioner's Appendix A, page 11). The Ninth Circuit correctly analyzed the issue of tribal common law sovereign immunity as it exists today, and clearly distinguished the ruling of the New Mexico Supreme Court in the case of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988).

> The issues involved in the *Padilla* case are not before us and we discuss it here only for the purpose of making the point that *the scope of Tribal Immunity has to be measured at the Common Law as it existed at some earlier time*, rather than adopting present limits on Sovereign Immunity accepted by the States for their own purposes.

Clearly the analysis followed by the New Mexico Supreme Court in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988) was one based solely on its perception of the law of New Mexico, in a purely State Court civil proceeding. While the Yakima Nation disagrees wholeheartedly with the *Padilla* holding, it forms no basis for a grant of Certiorari.

The issue here presented, being one of Federal statutory interpretation, and of federal common law immunity, creates no confusion or conflict in State Court proceedings, as those Courts must deal with the issue here presented through that federal law.

Further, this Court has in the past agreed that *Padilla* involved no significant State Court conflict which merits Certiorari. This Court rejected Certiorari on the *Padilla* case in 1988, in spite of the fact that the State Supreme Court decisions in *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *White Mountain Apache Indian Tribe v. Shelby*, 443 P.2d 421 (Arizona 1971); and *North Sea*

Products Ltd. v. Clipper Seafoods Co., 595 P.2d 938 (Wash. 1979), were all in existence at the time of the *Padilla* petition. Petitioners here allege *Padilla* is in conflict with these decisions, and the decision of the Ninth Circuit, thereby meriting a grant of Certiorari on that basis. Clearly this Court, in denying the Petition in *Padilla*, was aware of the alleged conflict, but felt the issue was not worthy of a grant of Certiorari. Such an alleged conflict should not now merit Certiorari.

Now, in light of the Court's recent ruling in *Patowatomi, supra*, it is clear that this Court recognizes the common law immunity of tribes under Federal Law, *Padilla* notwithstanding and correctly opined that if it presents a problem to Indian – non-Indian commerce, that Congress is best suited to deal with the issues.

Petitioner's allegations that a conflict with a State Court opinion warrants Certiorari are overridden by the totally Federal nature of this case, and by the cases of this Court, particularly *Potowatomi*, upholding the concept of continuing tribal immunity from unconsented suits for money judgments.

Further, the Ninth Circuit's opinion deals succinctly and clearly with the *Padilla* decision, and no further clarification is needed. The Ninth Circuit, after analyzing the Federal Law imperatives dealing with tribal immunity, stated:

> If there were error in the *Padilla* court's analysis, it was in failing to recognize that the scope of tribal immunity in the courts of New Mexico was not wholly a question of New Mexico law. As the *Padilla* court itself noted, "[a]bsent federal authorization, tribal immunity

> is privileged from diminution by the states." 754 P.2d at 847. *Thus, the court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.*
>
> The issues involved in the *Padilla* case are not before us, and we discuss it here only for the purpose of making the point that the scope of tribal immunity has to be measured at the common law as it existed at some earlier time, (footnote 4) rather than adopting present limits on sovereign immunity accepted by the states for their own purposes. (Petitioner's appendix A, pages 12-13)

If the Court denies Certiorari, the Ninth Circuit's analysis provides close and concise direction as to the resolution of tribal sovereign immunity issues. This Court need provide no further clarification than it has already done in its previous decisions on this issue.

VII. The "Dependent Status" test of *Oliphant v. Sequamish Tribe*, 435 U.S. 91 (1978), and *Montana v. U.S.*, 450 U.S. 544 (1983) is not one applied by this Court in Tribal Sovereign Immunity from suit.

Petitioner submits that the rulings of this Court in *Montana v. U.S., supra* and *Oliphant, supra,* hold that in dealings with non-Indians, the tribal "dependent status" doctrine has abolished tribal sovereign immunity from suit. It is obvious from a reading of any of those cases that this Court has made no such ruling. In fact, in a case involving the Yakima Nation, this Court specifically held that **"Tribal powers are not implicitly divested by virtue**

of the Tribe's dependent status." *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation*, 447 U.S. 134, 153-54 (1976). This is consistent with this Court's ruling in *Potowatomi, supra.*

While Tribes may occupy the "dependent status" alleged by Petitioner, this Court's independent line of sovereign immunity cases reflects that tribal sovereign immunity from suit, in dealings with non-Indians, is alive and well. *United States v. U.S. Fidelity and Guaranty Co., supra, Puyallup III, supra* and *Potowatomi, supra,* all involve Tribal dealings with non-Indians, with the Court recognizing the vibrancy of the tribes immunity from unconsented suits. The "Dependent Status" test is not a factor in the analysis of the "immunity from suit" line of cases. Petitioner is simply wrong in concluding that the "dependent status" test is a proper one in this case.

The Ninth Circuit opinion here carefully and correctly analyzed and rejected Petitioner's "dependent status" argument, finally concluding:

> In a general sense, a claim of tribal sovereign immunity involves external relations of the tribe. However, the dependent status of the tribes has been a factor in the analysis of tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts. *An assertion of sovereign immunity is not an affirmative act of the tribe, in the sense involved in the dependent status cases. It is instead, a claim of status arising from sovereignty itself.* Whether for this reason or others, the dependent status analysis has not

> been used by the Supreme Court in cases involving claims of tribal immunity. . . .
>
> As we analyze this somewhat confusing area of Indian tribal jurisprudence, we conclude that the pre-emption analysis comes into play when a state tries to regulate or tax activities on an Indian reservation. The dependent status of the tribes becomes a factor when a tribe is affirmatively asserting its sovereignty in dealing with its property or with non-tribal members. *Neither is involved when a wholly-owned tribal enterprise doing business on the reservation claims tribal immunity from a suit which is the result of a private commercial transaction. Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status.* (emphasis added) (Petitioner's Appendix A, pages 13-14)

Respondent submits that this language clearly, succinctly and accurately reflects the law of the land. The opinion of the Ninth Circuit says it in a nutshell: This Court does not apply the "dependent status" test to issues of sovereign immunity from suit. There is no basis for review under this section of Petitioner's argument.

VIII. The Ninth Circuit properly determined, by analysis of this Court's recent decision in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. ___, 117 L. Ed.2d 181 (1992), that Section 106(c) of the Bankruptcy Act did not abrogate the Yakima Nation's sovereign immunity from suit.

Petitioner argues that the Ninth Circuit erred in its analysis of the effects of section 106(c) on tribal immunity from suit. Although it is difficult to determine his exact argument, it appears that it is that the bankruptcy act is one of general application and therefore applies to Indians as well as all citizens of the United States. This argument ignores the rulings of this Court regarding tribal sovereign immunity. This Court has consistently held that tribal sovereignty and tribal sovereign immunity pre-dated the times of Treaty making and were part of the powers retained by Tribes. Accordingly, tribal immunity could only be affected by clear and unequivocal action by Congress:

> *"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.* (citations omitted) This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization' the 'Indian nations are exempt from suit'. (citation omitted) *It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'."* (emphasis supplied) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58

The Ninth Circuit opinion properly recognized the Yakima Nation's sovereign immunity from suit, and then proceeded to analyze the decision of this Court regarding the provisions of section 106(c) of the Bankruptcy Act, to determine what, if any, effect that Act has on tribal immunity from suit.

In its analysis, the Ninth Circuit relied on two recent cases from this Court, *Hoffman v. Connecticut Department of Income Maintenance,* 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.,* 503 U.S. ___, 117 L. Ed.2d 181.

Following its determination, under this Court's ruling in *Martinez, supra,* that abrogation of tribal immunity must be clear and unequivocal, the Ninth Circuit analyzed the tests applied by this Court for State and United States' abrogations of immunity from suit discussed in *Hoffman, supra,* and *Nordic Village, supra.* It found the test for abrogation of United States immunity is virtually identical to that required for Tribes:

> Waivers of the Government's sovereign immunity, to be effective, must be "unequivocally expressed." *Nordic Village,* 117 L. Ed.2d 181, 187

and

> Neither § 106(c) nor any other provision of law establishes an *unequivocal textual waiver* of the Government's immunity from a bankruptcy trustee's claims for monetary relief. Since Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed. (emphasis added) *Nordic Village,* 117 L. Ed.2d 181, 191

The Ninth Circuit likewise looked at the decision in *Hoffman, supra,* in which this Court determined that section 106(c) did not satisfy the standard that Congress made its intention to abrogate state immunity from suit "unmistakably clear":

> We disagree. As we have repeatedly stated, to abrogate the State's Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions, *Congress must make its intention "unmistably clear in the language of the statute."* (citations omitted) . . .
>
> In our view, § 106(c) does not satisfy this standard. *Hoffman,* 492 U.S. 96, 101 (emphasis added)

The Ninth Circuit, following the rulings in *Hoffman, supra,* and *Nordic Village, supra,* determined that the abrogation tests for Tribes was identical to the test applied in these cases. It then found that since section 106(c) did not "unequivocally" abrogate State or Federal immunity from suit, then it could not, under the standards set by this Court, abrogate tribal immunity. This conclusion is particularly compelling because both the statute and its legislative history are devoid of any mention of Indian Tribal governments.

The Ninth Circuit analysis is well reasoned and properly follows the precedents of this Court. There is no error in the conclusion of the Ninth Circuit. This Court should not disturb its ruling.

CONCLUSION

Petitioner points to no conflict with the decisions of this Court on the issue of tribal sovereign immunity. He attempts to reargue the case he presented to the Ninth Circuit. The opinion of that Court has squarely met and dismissed each of his arguments. The Ninth Circuit opinion is a well reasoned, solidly analyzed, and legally proper holding on the issues before it. It complies with this Court's opinions and the law of this land. It creates no conflict between the Circuits, and gives clear and concise guidance to lower federal courts. The supervisory powers of this Court are not necessary.

A grant of certiorari is not necessary in this matter.

DATED this 5th day of April, 1993.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

IN RE:

GREENE, Richard D.
and Donna J., No. 89-20544

Debtor(s).

ROSS RICHARDSON, Trustee,

Plaintiff,

v. Adversarial No. 90-0023

MT. ADAMS FURNITURE,

Defendant.

STIPULATED FACTS RE: TRUSTEE'S COMPLAINT
TO SET ASIDE PREFERENTIAL TRANSFER
UNDER SECTION 547

Pursuant to this Court's Orders of April 11, 1990, and May 8, 1990, counsel for the parties to this adversary proceeding submit the following stipulated facts:

1. The above-referenced Debtors filed a Petition for relief under Chapter 7 of the Bankruptcy Code on April 26, 1989. Prior to that time, the Debtors were operating a business known as Custom Carpets, in Townsend, Montana.

2. Mt. Adams Furniture has its principal place of business in Wapato, Washington, and is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation.

3. The Defendant, pursuant to its business, supplied and sold to Custom Carpets furniture items which subsequently became inventory of Custom Carpets, with title passing to Custom Carpets.

4. Mt. Adams Furniture held no perfected security interest in the furniture items sold to Custom Furniture, and within 90 days prior to the filing of the Debtors' Chapter 7 Petition, repossessed a portion of the furniture which had been sold to Custom Carpets. The value of this property repossessed was in the amount of $8,779, as evidenced by the credit memos attached hereto as Exhibit A.

5. That the repossession was voluntary and took place on account of an antecedent debt owed by Custom Carpets to Mt. Adams Furniture.

6. Mt. Adams Furniture had no knowledge that Custom Carpets would file bankruptcy proceedings within 90 days of the date of repossession.

7. That the parties agree that under the above-stated facts, a preferential transfer occurred under 11 U.S.C. Section 547. The primary issue to be decided by the Court is whether or not Mt. Adams Furniture is immune from suit by virtue of its status as a wholly owned enterprise of the Yakima Indian Nation.

These facts appear, to the undersigned counsel, to be the operative facts in determining the legal issues set

forth above. If any disputed facts come to the attention of counsel, those facts will be submitted in the memorandum to be filed with the Court, but counsel is not aware of any disputed facts at the time of executing this stipulation.

DATED this 1st day of June, 1990.

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Supreme Court, U.S.
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No. 92-1398

In The

Supreme Court of the United States

October Term, 1993

IN RE: GREENE, RICHARD D. & DONNA J.
husband and wife – Debtors

ROSS RICHARDSON, Chapter 7 Panel Trustee,

Petitioner,

vs.

MT. ADAMS FURNITURE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF ROSS RICHARDSON, CHAPTER 7 PANEL TRUSTEE, PETITIONER

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This Brief is submitted in response to the Solicitor General's Brief as Amicus Curiae, which expresses the views of the United States.

STATEMENT

Petitioner generally agrees with the statement of the case set forth by the Solicitor General of the United States (hereinafter "Solicitor General"). However, in the appeal to the United States Court of Appeals for the Ninth Circuit, the Petitioner herein never raised the issue of tribal sovereign immunity by analogy to the restrictive scope of foreign sovereign immunity embodied in the *Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 et sec.* This analogy was drawn by Circuit Judge Reimer in her concurring opinion, which opinion clearly points out the need for Certiorari in this case. The reasoning as set forth in Petitioner's original brief serves as a basis for dispensing with Tribal immunity.

DISCUSSION

In both the Brief of the Solicitor General and Respondent Mt. Adams Furniture (hereinafter "Mt. Adams"), it is asserted that this case presents a "narrow issue" for the Court to decide. To the contrary, as Judge Reimer's concurring opinion to the Ninth Circuit opinion pointed out, the issue decided by the Ninth Circuit completely throws open the door of tribal sovereign immunity in the context of commercial activities and extends that immunity to Indian Nations engaged in interstate commerce. Moreover, as the Brief of the Solicitor General accurately points out, the decision conflicts with numerous decisions of this Court, other Federal Courts and State Courts of last resort.

The Solicitor General notes that the Ninth Circuit opinion below relied upon the *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992), for the proposition that sovereign immunity of the Indian tribe is not affected by the Bankruptcy Code, since 11 U.S.C. Section 106 of the Code does not waive sovereign immunity. The reliance on *Nordic Village*, however, is misplaced. The decision in *Nordic Village* is limited to the

specific facts which involved the United States government, which is by definition a "governmental unit". Section 106 states:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –
>
> > (1) a provision of this title that contains "creditor", "entity", or "governemntal unit" applies to governmental units; and
> >
> > (2) a determination by the court of an issue arising under such a provision binds governmental units.

In the opening Brief of the Appellant, Mt. Adams Furniture Company, to the United States Court of Appeals for the Ninth Circuit, Mt. Adams discussed Section 106 and stated:

> This statute waives sovereign immunity to an extent for "governmental units". The question then becomes did congress intend Indian tribes to be included as a "governmental unit" in the waiver of sovereign immunity statute found at 11 U.S.C. Section 106.
>
> The term "governmental unit" is defined by the Bankruptcy Code at 11 U.S.C. Section 101(26). This definition reads as follows:
>
> > "(26) 'Governmental Unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States

> (but not a United States Trustee while serving as trustee in a case under this title); a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;"

It is readily apparent that Indian tribes were not included within the definition of governmental unit. The Yakima Nation has found nothing in the legislative history of the Bankruptcy Code and amendments thereto which would suggest Congress intended Indian tribes to fall within the definition for "governmental unit". *Opening Brief of Appellant Mt. Adams Furniture to the United States Ninth Circuit Court,* page 13.

Further, Mt. Adams goes on to state:

> Indian tribes are not contained in the definition of "governmental unit" found at 11 U.S.C. Section 101(26). It bears repeating that there is no indication in the legislative history for the Bankruptcy Code and amendments thereto which would unequivocally show Congress intended Indian tribes were to be included within the definition for "governmental unit". . . . *Opening Brief of Mt. Adams Furniture to the United States Ninth Circuit Court,* page 14.

Nordic Village is clear and limited in its application. State and federal sovereigns which are specifically enumerated under 11 U.S.C. Section 101(26) (now [27]), are to be treated the same for immunity purposes. The same is not true of Indian Nations. Moreover, as pointed out in Trustee's original brief, the Bankruptcy Code does apply to the tribe because of the "dependent status" of the Indian Nation. In *F.P.C. v. Tuscarora,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), this Court held that a general statute which by its terms applies to all persons includes Indians and their property interests. See also *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1115-16 (9th Cir. 1985). The Bankruptcy Code is a general statute which does apply to Indians.

IMMUNITY AS DETERMINED BY THE UNITED STATES SUPREME COURT

The Solicitor General points out that this Court has recognized limits on tribal authority by virtue of the Indian tribe's dependent status within the federal system. These decisions are not inapposite, but have a direct bearing on the matter before this Court. The Solicitor General relies primarily on decisions of this Court for the proposition that the Ninth Circuit's decision in this case is appropriate. However, as shown hereafter, all of these decisions support the granting of Certiorari in this case.

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the Solicitor General found solace in the statement that "suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation". *Id.*, at 509. The *Potawatomi* decision, however, actually limited Indian sovereign immunity.

The question before the *Potawatomi* Court dealt with the imposition of Oklahoma's state cigarette tax on the sales of those cigarettes, which occurred in stores *which were located on Indian land*. The Court decided that under the doctrine of Tribal Sovereign Immunity, the state could not tax sales to Indians, but it did remain free to collect taxes on sales to non-members of the tribe. Of importance to this case is the fact that the lands on which the stores were operated were "held by the Federal Government in trust for the benefit of the Potawatomis", thus qualifying as a *reservation* for tribal immunity purposes. 498 U.S., at 511. The decision, therefore, does not stand for the argument the Solicitor General makes.

Although the activity complained of was clearly *on reservation*, the Court nonetheless found a waiver of immunity for sales occurring to non-Indians. As Justice Stevens' concurring opinion notes, this holding rejects the tribe's argument of complete immunity from legal process. Justice Stevens stated:

> The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979). In my opinion all

> Governments – federal, state, and tribal – should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. See *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940). *Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, . . .* (Emphasis supplied).

Also relied upon by the Solicitor General was Language from this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. 436 U.S., at 58.

In *Santa Clara Pueblo* petitioners sought declaratory and injunctive relief against the Indian tribe in Federal Court concerning a tribal ordinance which denied membership in the tribe to offspring of certain female tribal members. It was an internal matter concerning tribal members and a matter of very great importance to the individuals. Plaintiffs had access to their own elected officials and their tribal machinery to settle the problem. It was strictly an internal problem with no non-Indians involved.

The basis for the suit was an alleged violation of Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1301-1303. This Court found that the Act did not authorize this type of an action in the Federal Courts. It should be noted that the activity dealt with in this case was not involved in the stream of commerce off of the tribal lands. Thus, this case does not stand for the proposition that Indian immunity has been extended to "off-reservation commercial activity". This case was also clearly distinguished by the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), which is discussed hereafter.

Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165 (1977), is relied on by the Solicitor General for the proposition that immunity also extends to off-reservation activity. Again, the facts of *Puyallup* clearly indicate that this Court did not so extend the immunity doctrine. Here, the State of Washington attempted to regulate fishing activities of the tribe by imposing state conservation laws promulgated by the Washington State Department of Game. The tribe claimed sovereign immunity and this court found that the state could not exercise jurisdiction over the tribe itself with respect to the lawsuit. Again, the facts of this case dealt with an attempt by the State of Washington to exercise jurisdiction over Indian activity which took place *on the reservation*. This decision cannot be extended any further. there is no distinction between on-reservation activity versus off-reservation activity in this case.

Specifically, the state court placed a limit on the number of steelhead fish which all members of the tribe could catch with nets, and directed the tribe to identify members engaged in the steelhead fishing industry and to report the number of fish they caught each week. 433 U.S., at 172. It was to this order that the tribe claimed, and received, immunity. This Court specifically noted that the State could regulate the fishing of individual tribesmen on or off the reservation.

Finally, Justice Blackmun's concurring opinion points out the difficulty with the doctrine of Indian immunity in this day and age when he states:

> I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). I am of the view that the doctrine may well merit re-examination in an appropriate case. 433 U.S., at 178-179.

Puyallup did not extend tribal immunity to off-reservation activity involving interstate commerce.

Although the Solicitor General only referred to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), by footnote, this decision is completely contrary to the result reached

by the Ninth Circuit. In *Mescalero*, this Court held that a tribal ski resort, which was located on land leased from the federal government and not on Indian lands, was liable to pay to the state a non-discriminatory gross receipts tax. *Mescalero* clearly holds that Tribal Immunity will be strictly limited to "on-reservation" activities. This Court noted:

> But tribal activities conducted outside the reservation present different considerations. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state. 411 U.S., at 148-149.

This Court refused to apply a blanket tribal immunity to all Indian activity and concluded that the tribe's ski resort (not "individual Indians" as claimed by the Solicitor General), which was off tribal lands, was subject to the state's gross receipts tax.

The same analogy exists in the present case. The all-encompassing Bankruptcy Code clearly applies to Indian activity which is off of tribal lands. Under the rationale applied in *Mescalero*, the Tribe would be subject to the Bankruptcy Code.

FEDERAL COURT DECISIONS

Contrary to the assertions of the Solicitor General, the federal court decisions previously cited to this Court by the Trustee are directly on point. The full context of the citation noted by the trustee in *North Dakota – Montana Wheat Growers' Ass'n v. United States*, 66 F.2d 573 (8th Cir. 1933), cert. denied, 291 U.S. 672 (1934), states as follows:

> It is true that courts have drawn distinctions between the action of the government in what is termed its "sovereign capacity" and its operations in commercial transactions generally carried on by corporations organized by the government and invested with some of the sovereign functions. *Id*, at 578.

Although the Eighth Circuit eventually held that immunity applied to a counterclaim against the Federal Farm Board, by the aforementioned language it did impliedly concede that a government is not immune from suit where it organizes and operates a business operation.

The most glaring conflict between the decision below is found in the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes, (supra)*. In fact, the Solicitor General openly concedes that this case is "plainly inconsistent with *Santa Clara Pueblo*, which held that suits against a tribe under the ICRA are barred by sovereign immunity,. . . . " solicitor General's Brief, page 15. As before-noted, *Santa Clara Pueblo* is one of the seminal cases relied upon by the Solicitor General in his Amicus Brief to this Court.

Dry Creek Lodge was decided in light of *Santa Clara Pueblo*, and the Eighth Circuit specifically distinguished the cases. Instead of discussing the Indian Civil Rights Act of 1968, the Eighth Circuit dispensed with the tribal claim of immunity by noting:

> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian. 623 F.2d, at 685.

The Solicitor General argues that the basis for the *Dry Creek Lodge* decision is the premise that "there ha[d] to be a forum where the dispute can be settled". 623 F.2d, at 685. This assumption, however, fails to include the fact that the Eighth Circuit also found that since the activity did not involve internal tribal affairs, and involved a non-Indian, tribal immunity disappears. There is no question but that if the facts of this case were presented to the Eighth Circuit, the tribe's immunity would be limited and the Bankruptcy Court would have jurisdiction to decide the matter. In *Dry Creek Lodge* we have a federal court applying federal law (ICRA) with an assertion by the Indian tribe of immunity. Even in light of the often-quoted language of *Santa Clara Pueblo*, this court found that Indian tribal immunity did not apply for the

aforementioned reasons. It is directly on point and it is the only such case that has been presented to this Court.

STATE COURT DECISIONS

Again, contrary to the assertions of the Solicitor General, the state cases cited by the Trustee provide further evidence of the conflicts which have arisen in decisions involving Indian tribal immunity. In *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), the New Mexico Supreme Court was faced with a state law breach of contract claim against a tribal business for work performed *off of the reservation.* The *Padilla* court offered an extensive, well-reasoned approach to the law surrounding Indian tribal immunity. After reviewing the "Supreme Law of the Land" the New Mexico Court could find no provision which prohibited a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct. Consequently, the Court held that the exercise of jurisdiction in this case was appropriate. 754 P.2d, at 850.

As before-noted, there is no case that has been presented either by Mt. Adams or the Solicitor General that provides that an Indian tribe is granted the same immunity as the federal government possesses under the Bankruptcy Code. To the contrary, as has been noted above, this Court has made clear that a general statute applies to all persons and includes Indians and their property interests. *F.P.C. v. Tuscarora,* (*supra*); *Donovan v. Coeur d'Alene Tribal Farm,* (*supra*). Moreover, the *Dry Creek Lodge,* (*supra*), rationale would specifically mandate that Bankruptcy Court be the forum wherein this matter is decided. In like manner, under the reasoning of *Padilla,* the Bankruptcy Court would have jurisdiction to hear this matter.

This court refused an application by the Indian tribe in *Padilla* to review the New Mexico court's decision. However, Justice White dissented from that denial and urged this Court to hear the case "to resolve the conflict among the state courts". 490 U.S., at 1030.

In addition, *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, (Ariz. 1989), also supports the trustee's position that tribal sovereign immunity does not protect a corporation organized under tribal law, for acts it engages in off of tribal lands. The Solicitor General's argument notwithstanding, *Dixon* also supports the Trustee's position that Indian immunity is limited when the activity that is the basis for legal action is off the reservation.

CONCLUSION

There are at least three (3) United States Supreme Court decisions, two (2) Federal Court decisions and two (2) State Court decisions which have limited tribal immunity when the circumstances involve activities off the Indian lands and in the trade of commerce. The decision from the Ninth Circuit below clearly conflicts with the results reached in the aforementioned cases. Although the Solicitor General's brief asserts that this Court should not grant Certiorari in this case, it does clearly point out what Justice Reimer's concurring opinion stated. The question as to whether or not tribal sovereign immunity extends to commercial activities is an important, complex and unresolved question. Neither Mt. Adams nor the Solicitor General has provided to this Court any case on point which directly provides that the Bankruptcy Code does not apply to activities involving Indian Nations which are off of tribal lands and involved directly in interstate commerce. The Solicitor General's brief evolves into a critique of every court decision cited by the Petitioner. The arguments are wide ranging and far afield in an effort to show that the decisions are "inapposite" to the Ninth Circuit's ruling. The only conclusion that can be reached from these legal arguments is that this Court must act and resolve the conflict.

DONE AND DATED this 30th day of December, 1993.

Respectfully submitted,

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